92-736 (1)

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No.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

HIRAM H. HOELZER,

Petitioner,

v.

THE CITY OF STAMFORD, CONNECTICUT.

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

PETITION FOR WRIT OF CERTIORARI

Stephen A. Wise,
Counsel of Record
Wise and Layton
125 Main Street
New Canaan, CT 06840
(203)-966-8600

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THE QUESTION PRESENTED

Should this Court use its supervisory power under Rule 10.1(a) in view of the Circuit Court's departure from the accepted and usual course of judicial proceedings and from due process of law in that:

A. The Circuit Court modified a decision even though finding it error-free and based on substantial evidence;

B. The Circuit Court ignored and misstated evidence in order to reach its decision;

C. The Circuit Court disregarded the law of the case fixed by another panel of the same court on a prior appeal without any later change of circumstances; and

D. The Circuit Court relieved the respondent City of Stamford, Connecticut, from paying properly assessed damages when the record shows that it knew the amount claimed and chose to have the issue tried?

TABLE OF CONTENTS

	Page
The Question Presented	i
Index to Petition	ii
Table of Authorities	iv
Opinions and Proceedings Below	1
Jurisdiction to Review	3
The Facts	4
POINT I: THE CIRCUIT COURT DEPARTED SO FAR FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR SUPERVISION AND REVERSAL	12
This Court's supervisory power	13
The acts calling for the exercise of that supervisory power:	
A. The Circuit Court modified a decision even though finding it to be error-free and based on substantial evidence;	15
B. The Circuit Court ignored and misstated evidence in order to reach its decision;	18
C. The Circuit Court disregarded the law of the case fixed by another panel of the same court on a prior appeal without any later change of circumstances; and	21

D. The Circuit Court relieved the respondent City of Stamford from paying properly assessed damages when the record shows that it knew the amount claimed and chose to go to trial. 25

POINT II: THE FOUR DEPARTURES FROM ACCEPTED PRACTICE BY THE CIRCUIT COURT SHOWN IN POINT I DENIED THE PETITIONER DUE PROCEES OF LAW AND THREATEN UNLIMITED ABUSE OF POWER BY COURTS IF PERMITTED. 27

POINT III: THE CIRCUIT COURT'S DECISION WAS GROSSLY INEQUITABLE. 31

CONCLUSION: CERTIORARI SHOULD BE GRANTED. 34

TABLE OF AUTHORITIES

Decisions Other Than In This Case	Page
Alden Auto Parts Warehouse, Inc. v. Dolphin Equip. Leasing Corp. 682 F.2d 330 [2d Cir. 1983]	17
Bello v. Walker, 840 F.2d 1124 [3rd Cir. 1988], cert. den. 488 U.S. 851)	28
Burnett v. Central Nebraska Public Power & Irr. District. 125 F.2d 836 [8th Cir. 1942]	28
Central Soya Co. v. Geo A. Hormel & Co., 723 F.2d 1573 [Fed. Cir. 1983]	22
Davis v. Wakelee, 156 U.S. 68; 39 L.Ed. 1403; 68 S.Ct. 1039 [1894]	25
Inwood Laboratories v. Ives Laboratories, 456 U.S. 844; 72 L.E.2d 606; 102 S.Ct. 2182 [1982]	15
Kori Corp. v. Wilco March Baggies & Draglines, Inc., 761 F.2d 649 [Fed. Cir. 1985], cert. den. 474 U.S. 902	23
Marshall v. Jericho, Inc., 446 U.S. 234; 64 L.Ed.2d 182; 100 S.Ct. 1610 [1980]	29
Mathews v. Eldridge, 424 U.S. 319; 47 L.Ed.2d 18; 96 S.Ct. 893 [1980]	29
Messinger v. Anderson, 225 U.S. 436, 56 L.Ed. 1152, 32 S.Ct. 739 [1912]	22

New York City Transit Authority v. Beazer, 440 U.S. 568; 59 L.E.2d 587; 99 S.Ct. 1355 [1979] 14,27

Roth v. McAllister Bros., Inc. 316 F.2d 143 [2d Cir., 1963] 25

Rudder v. United States, 226 F.2d 51, [D.C. Cir. 1955] 28

Southern Ry. Co. v. Blue Ridge Power Co., 30 F.2d 33, cert. den. 279 U.S. 860 15

Western Fire Ins. Co. v. University City, 124 F.2d 698 [1942] 23

Constitutional Provisions and Rules

Federal Rules of Civil Procedure
Rule 33(b) 20

United States Constitution, Fifth Amendment 28

United States Supreme Court Rules
Rule 10.1(a) 3, 13
Rule 15.1 7

Other Authorities

Corpus Juris Secundum, Estoppel 25

Moore's Federal Practice, Rule 10.1 13

Supreme Court Practice, Stern, Gressman & Moore, 6th ed. 30

OPINIONS AND PROCEEDINGS BELOW

In this bifurcated trial on the separate issues of title to a mural and the value of the plaintiff's services in restoring it, the opinions and decisions below were as follows (A 1-82):[1]

1. On October 16, 1989, the District Court held that the respondent City of Stamford had title (A 38; 722 F.Supp. 1106, S.D. N.Y. [Stanton, J.]).

2. On Jan. 3, 1990, the District Court certified an intermediate appeal (A 73).

3. On May 28, 1991, the Circuit Court affirmed and allowed the petitioner to seek compensation for his services (A 8 & 24; 933 F.2d 1131 [Kaufman, Kearse & Newman, JJ.'s]).

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1. The following abbreviations will be used: A = Appendix hereto; JA = Joint Appendix on appeal; TR = Trial Transcript; the City = the respondent.

4. On July 12, 1991, the Circuit Court denied a rehearing or en banc review of its original decision (A 77).

5. On Jan. 29, 1992, after a non-jury trial, the District Court fixed the value of those services at $557,200 (A 28; ___ F.Supp. ____ [Stanton, J.])

6. On August 13, 1992, the Circuit Court affirmed the District Court in full but permitted Stamford to return the mural in lieu of paying the petitioner (A 8; 972 F.2d 495 [Lumbard, Van Graafeiland & Kearse, JJ.'s]).

7. On September 29, 1992, the Circuit Court denied a rehearing or en banc review of the second decision (A 79).

8. On October 7, 1992, the Circuit Court issued its mandate (A 81).

JURISDICTION TO REVIEW

Review is sought of the Circuit Court's decision of August 13, 1992 (A 1), of the denial of rehearing and en banc review of September 29, 1992 (A 79), and of the mandate thereon of October 7, 1992 (A 81), pursuant to 28 U.S.C. § 1254(1) and Rule 10.1(a) of this Court, which states:

> "Jurisdiction on Writ of Certiorari [exists] When a United States court of appeals has...so far departed from the accepted and usual course of judicial proceedings ...as to call for an exercise of this Court's power of supervision."

Jurisdiction below was based on diversity of citizenship, namely, the petitioner was a citizen of New York and had the mural there, while the City was a citizen of Connecticut.

THE FACTS

This is an action by an art restorer seeking a declaratory judgment that he owned a mural or, if not, awarding him the value of his services in restoring it (JA 9). The City denied his ownership but admitted that he was entitled "to the reasonable market value of his restoration and/or preservation services" (JA 15).

The trial as to title was on stipulated facts which, as summarized from the District Court's first decision, included the following:

The petitioner is a noted art restorer with particular expertise in restoring large murals painted under the Works Progress Adminstration in the 1930s. During a renovation of the Stamford High School in 1970, a mural about 8 feet high and 110 feet long was ripped from the

walls of the City's High School, placed in a dumpster, recovered by a student, turned over to the General Services Administration, delivered by the G.S.A.'s supervisor of W.P.A. works to the petitioner in 1971 with no contract or instructions, and restored by him over the next 16 years (A 38-72).

In 1980 and thereafter, officials of the City viewed the mural in his studio at various times, claimed title to it only in 1986, and even then did not ask him to stop the restoration (id.).

As the District Court later found, the petitioner did this "in the good faith belief that the murals were property which had been abandoned to him and that he owned them" (A 31).

Notwithstanding its finding that "The City can be faulted for leaving a valuable piece of art in storage for so long" (A

65), the District Court held that "The City owns the mural" (A 66). This was affirmed by the Circuit Court on an intermediate appeal, which held that the petitioner "may, if he seeks to, pursue whatever claim exists for equitable compensation" (A 24).

The District Court, after detailed testimony by the petitioner's three experts (JA 60-87 and TR 186-244), which was not refuted by the City's three experts (JA 88-96 and TR 80-186, 244-251, 309-356), fixed that compensation at $557,200 (A 33 & 37). The chronolgy between the bifurcated trials is critical:

1. The method of reaching that amount was set forth in the record in the petitioner's "Answer to Interrogatory A-1" propounded by the City, which was served upon the City on November 19, 1989 and was detailed in his chart thereof whose column

D totaled precisely thet $557,200 awarded in 1992.[2]

2. This directly contradicts the Circuit Court's findings on the second appeal that the City "could have had no idea that the cost of restoring the mural would come to $557,200" and did not learn this until "the 1992 trial" (A 6). The

2. JA 128, 134 & 135, Exhs. 34 & 35:

A	B	C	D
Year	Restora. Charge/Day All Workers	No. of Restora. Days Worked	Restora. Charge For Year (BxC)
1971	$ 600	16	$ 9,600
1974	800	13	10,400
1977	1,200	13	15,600
1980	1,600	26	41,600
1986	1,600	200	320,000
1987	1,600	100	160,000

The petitioner notes the provision in this Court's Rule 15.1 that "**Counsel are admonished that they have an obligation to the Court to point out any perceived misstatements in the brief in opposition, and not later.**" (emphasis by the Court). The City cannot deny that it received the chart in November of 1989, for it was served in anticipation of the conference for scheduling the second trial set by Judge Stanton's first decision (A 72) and, outside the record, it was filed in the Court on November 27, 1989 (Docket # 29) and was included in the papers which were discussed with Judge Stanton on the adjourned conference date of November 30, 1989.

record contained other evidence that the City knew of this claimed amount well before the trial, as follows:

a. The plaintiff's 1989 chart and his $557,200 claim were specifically ratified in the pre-trial affidavits of the petitioner and his three experts filed as their direct testimony and served upon the City in 1991 (JA 52, 65, 79 & 86).

b. The amount was repeated in the 1991 "Consent Pre-Trial Order" signed by counsel for both Parties (JA 26).

3. Before the trial of that monetary claim, Judge Stanton certified an intermediate appeal on the issue of title, stating, inter alia:

> "If the district court's decision is affirmed, any further appeal may be unlikely since it would address only the calculation of compensation" (A 74).

4. In its brief on the first appeal, the City concluded its argument that it

had title by stating: "There is no 'windfall' to the City, as the City has admitted that plaintiff is entitled to compensation for his services in restoring the mural." (Brief on appeal, p. 18) -- a fact later stressed in the petitioner's brief on the second appeal (Brief, p. 10).

5. Judge Kaufman's conclusion that the petitioner could proceed to seek compensation for his restoration services (A 24) reflected his reliance on the City's brief in the following colloquy:[3]

> Judge Kaufman: "Mr. Wise, if Stamford has title to the mural, why will Mr. Hoelzer not be adequately compensated by payment for his restoration services?"
>
> Mr. Wise: "Your Honor, Stamford may well refuse to pay for such services or be unable to do so."
>
> Judge Kaufman: "That is not a likelihood."

3. There is no transcript of this, but it was quoted thus in the petitioner's brief on the second appeal and was not questioned by the City's attorney or by Judge Kearse, who sat on both panels.

6. After Judge Stanton made his award, Stamford appealed, and the brief filed by the petitioner included the following, which is contrary to the Circuit Court's decision (Brief, p. 21, emphasis added):

> "[T]he amount of $557,200 was no surprise to Stamford, as shown by the following. After the first trial but before the prior appeal, Stamford served interrogatories upon Mr. Hoelzer and, in November of 1989, he replied and submitted his charted calculation of that amount (JA 134 & Exh. 35, supra p. 3)".

That statement specifically called to the Circuit Court's attention the petitioner's 1989 claim totalling $557,200, as well as the references thereto in the record, i.e. the chart set forth on page 7, supra. These directly contradict the Court's later finding that the City could have had no knowledge of the petitioner's $557,200 claim until the 1992 trial (A-6).

Notwithstanding, the Court then nomi-

nally affirmed Judge Stanton's decision but, with no request by the City, gave the City the option of returning the mural without paying the petitioner (A 7).[4]

That was a bargain in 1992, for the City's own appraiser testified that the "current [art] market, which has changed from 1987" is "uncertain and bad... Prices are down substantially" (TR 126-7).

Nevertheless, after the $557,200 was awarded, the City took possession of the mural, still has it (A 24), and never even suggested that it be relieved from paying for the petitioner's restoration.[5]

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4. In a letter to the counsel for the petitioner, the City promptly so elected outside the record.

5. A signed but unfiled stipulation proposed and drafted by the City (set forth at A 83) provided that the City "will maintain in its self-insurance account at least $650,000 unencumbered and available to satisfy the judgment" and that the purpose of this was that the City "would rather pay to the Plaintiff the non-refundable appeal bond premium to reduce the obligation for storage and partial restoration that the defendant acknowledges it owes to the Plaintiff even if the defendant is successful on appeal and there is a remand for new trial".

POINT I

THE CIRCUIT COURT DEPARTED SO FAR FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THIS COURT'S SUPERVISION AND REVERSAL.

Although holding that "Judge Stanton's award of $557,200 is supported by substantial evidence" and contained "no error" (A 6), and although acknowledging the rule that "An appellate court will set aside such an exercise of discretion only if it is arbitrary" (id.), the Circuit Court went on to find that "Nevertheless Stamford could have had no idea that the cost of restoring the mural could come to as much as $557,200" and learned of this only "at the 1992 trial" (id.).

Based on that statement alone, the Court then modified the District Court's award of compensation by allowing the City to "satisfy the judgment by abandoning its ownership of the murals and returning them

to Hoelzer" (A 7).

Not only is this an unprecedented departure from the rule of finality of error-free judgments which are based on substantial evidence supporting a reasonable amount, but the underlying premise of the City's ignorance of its risk was palpably incorrect. After a brief discussion of this Court's Rule 10.1(a), both of these errors, and others, are shown in detail below (pp. 15-26).

This Court's supervisory power

Commenting on Rule 10.1(a), Moore's Federal Practice states (¶ 810.27):

> "This is an old and well established provision that directly relates only to the federal courts of appeals, and goes back to the Revised Rules of 1925 that promptly followed the Judiciary Act of that year.
>
> "It is an appropriate provision. The Supreme Court stands at the apex of the federal judicial system...

> "Rule 10 recognizes an additional responsibility -- to ensure that the courts of appeals stay within the boundaries of 'the accepted and usual course of judicial proceedings'".

That Rule (then numbered 19 and later numbered 17) has been applied to the Court of Appeals for the Second Circuit (New York City Transit Authority v. Beazer, 440 U.S. 568, [1979]). There, the Court of Appeals had strayed from required practice when it "affirmed [the District Court] without reaching the statutory question" in issue (p. 571). Quoting the Rule (id.), this Court found that to be a "departure from the procedure normally followed...[which] led us to grant certiorari" and then to reverse (id.).

In the present case, the following four instances of the Circuit Court's active departure from normal procedure go far beyond the passive one in Beazer.

A. The Circuit Court modified a decision even though finding it to be error-free and based on substantial evidence

The Circuit Court created an option for the City to escape paying the compensation awarded even though finding that the District Court's award contained "no error" and had been based on "substantial evidence" (A 6-7). Even before reaching the inherent breach of the principle of the "law of the case" discussed below (pp. 21-25), this departure violated basic practice:

> "Because of the deference due to the trial judge, unless an appellate court is left with the 'definite and firm conviction that a mistake has been committed', it must accept the trial court's findings." (Inwood Laboratories v. Ives Laboratories, 456 U.S. 844, 855 [1982]); accord, Southern Ry. Co. v. Blue Ridge Power Co. (30 F.2d 33, 40 [4th Cir. 1929], cert. den. 279 U.S. 860).

Here, with the case having been left by Judge Kaufman's panel on the first

appeal to the District Court to determine "equitable compensation" (A 24), the Circuit Court on the second appeal acknowledged that "equitable remedy rests in the sound discretion of the district court" (A 6) and expanded with the following lip-service to this Court (id.):

> "See Lemon v. Kurtzman, 411 U.S. 192, 200 (1973) (plurality opinion) ('In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow.'"

Continuing, the Court then conceded: "An appellate court will set aside such an exercise of discretion only if it is arbitrary" (id., emphasis added).

But in the end, the Court disregarded all of this by modifying Judge Stanton's decision without finding anything arbitrary there. The Court cited no supporting statute, no rule, no holding, and only one barely tangential case of its own, thus:

"See Alden Auto Parts Warehouse, Inc. v. Dolphin Equip. Leasing Corp. 682 F.2d 330, 333 (2d Cir. 1983)." (A 7).

There, the District Court had "found that both parties had been negligent" (id., p. 332). The Circuit Court found that "each was in error as to a different fact" (id.). The Court then discussed the rule that relief from "a unilateral mistake ...will normally not be granted if the defendant, by changed circumstances or otherwise, will be prejudiced" (id., p. 333). The Court then explained that "There is no dispute that in the present case there has been a change of circumstances" (id.). Nevertheless, the Court affirmed, explaining (id., p. 334):

> The appellant "Alden's reliance on the principle that a claimant's carelessness in executing an agreement does not bar recovery is misplaced. Such negligence may not be a defense to a right to recovery if such a right is prima facie established." (emphasis added).

Here, there were no such changed circumstances; the City did not claim any or show any unilateral mistake; nor did the Circuit Court; and none existed. Rather, going far beyond the "prima facie" proof mentioned by the Alden case as barring such a defense, the petitioner's right to compensation was established by the first decisions of the District and Circuit Courts (A 28 and 24).

Thus, the Court disdained the basic finality of judgments which are error-free and supported solidly by evidence. Beyond that, the Court closed its eyes to the record, as is shown next.

B. The Circuit Court ignored and misstated evidence in order to reach its decision.

The controlling premise of the Circuit Court's decision is that the City "could have had no idea" of the amount of the petitioner's $557,200 claim until it

was made "at the 1992 trial" (A 6).

The invalidity of such an excuse from paying damages is discussed below (pp. 25-26). However, assuming, arguendo, that it is valid, the factual inaccuracy of the Circuit Court's statement is clear from the record as made known to the Court.

The petitioner's chart of his days spent on the restoration and his charges therefor (supra, p. 6, fn. 2) was given such emphasis that it appears in the record twice: first, as the last page of the petitioner's "Answer to Interrogatory A-1" (Exh. 34 at JA 128 & 134); second, on a separate page (Exh. 35 at JA 135).

The City's full awareness that the petitioner's claim was $557,200 is further shown by the following excerpts from the facts already set forth:

1. The City received the charted calculation in November of 1989, when it

was filed and discussed with Judge Stanton (supra, p. 7, fn. 2).

2. The City was reminded of that amount forcefully by the various pre-trial evidentiary affidavits in 1991 (supra, p. 8: JA 52, 65, 79 & 86).

3. The City itself acknowledged its awareness of that amount as the claim by signing the "Consent Pre-Trial Order" in 1991 (supra, p. 8: JA 35 & 26).

The Circuit Court was put on notice of this advance knowledge by the City in two ways.

First, the caption on Exhibit 34 -- "Answer to Interrogatory A-1" -- necessarily shows pre-trial disclosure of what is intended to be put to "Use At Trial" (F.R. Civ. P. 33(b)).

Second, the petitioner's main brief unequivocally informed the Court that "the amount of $557,200 was no surprise to

Stamford" since it had been detailed in his aforesaid chart answering the City's interrogatories and sent to the City "in November of 1989" (supra, p. 10).

Reduced to its essence, the issue focused on by the Circuit Court was "What did the City know of the amount in issue, and when did it know it?" The Court was blind to the record's pivotal evidence that the City was told of the extent of the restoration services and their cost early and often. That evidence effectively wiped out even the Court's premise for its unprecedented decision discussed in the preceding section.

C. The Circuit court disregarded the law of the case fixed by another panel of the same court on a prior appeal without any later change of circumstances.

In its decision on the itermediate appeal affirming the City's title to the mural, Judge Kaufman's panel set the "law

of the case" by permitting the petitioner to seek "compensation" in the District Court (A 24). The Circuit Court's second decision, for which certiorari is sought, reversed that by allowing the City to "satisfy the judgment by abandoning its ownership of the murals and returning them to Hoelzer" (A 6-7).

In doing this, the second panel did not even suggest any intervening change of circumstances to justify disregarding the doctrine of the law of the case.

That doctrine "expresses the practice of courts generally to refuse to reopen what has been decided" (Messinger v. Anderson, 225 U.S. 436, 444 [1912]; quoted in Central Soya Co. v. Geo A. Hormel & Co., 723 F.2d 1573, 1580 [Fed. Cir., 1983]). In Central Soya, where the case had been bifurcated between liability and damages, the Court declined to review the

damages decision, explaining:

> "[T]he law of the case doctrine...generally adheres to a decision in a prior appeal in the case unless one of three 'exceptional circumstances' exists: 'the evidence on a subsequent appeal was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice" (id.; quoted approvingly in Kori Corp. v. Wilco Marsh Baggies & Draglines, Inc., 761 F.2d 649 [Fed. Cir. 1985], cert. den. 474 U.S. 902). -- Stated alternatively:
>
> "True, the doctrine of the law of the case is a rule of practice and not a limitation of power, yet it will not, except for very cogent reasons, be departed from." (Western Fire Ins. Co. v. University City, 124 F.2d 698, 699 [1942]).

The absence of any such "exceptional circumstances" here is implicit in the Circuit Court's finding of "no error".

The reversal of the law of the case set by Judge Kaufman's opinion obliterated

the numerous underlying facts, e.g. Judge Stanton's certification of the intermediate appeal on the presumption that "any further appeal may be unlikely since it would address only the calculation of compensation" (A 73); the City's assurance to Judge Kaufman's panel that the petitioner "is entitled to compensation for his services" (see supra, p. 8); Judge Kaufman's statement at the argument of the appeal that it was "not a likelihood" that Stamford would not pay the compensation (see supra, p. 8); the authorization in Judge Kaufman's opinion to the petitioner to seek "compensation" (A 24); and Judge Stanton's reliance on and quotation of that authorization in his decision after the second trial (A 33).

Not once, never, did the City ask the Court to relieve it from its assurances that it would pay the compensation. Even

the outstanding stipulation in lieu of appeal bond "acknowledges" the City's obligation to pay the petitioner (see supra, p. 11). Nor, in view of its admissions and briefed argument to the Court on the first appeal (see supra, pp. 4 & 8) could the City have withdrawn its promises to pay the compensation, for:

> "The rule is well established that during the course of litigation a party is not permitted to assume or occupy inconsistent and contradictory positions" (31 C.J.S., Estoppel, § 117(b & a); Davis v. Wakelee, 156 U.S 680,689 [1894], cited approvingly in Roth v. McAllister Bros, Inc., 316 F.2d 143, 145 [2d Cir. 1963]).

The Circuit Court flouted the law of this case set on the first appeal.

D. The Circuit Court relieved the City from paying properly assessed compensation when it knew the amount claimed and chose to have the issue tried.

If the discussion above (pp. 17-19) had not disproven the Circuit Court's

finding that the City "could have had no idea" of the amount of the petitioner's claim, the answer would be that trial judgments generally surprise at least one of the litigants. Only settlement agreed to before judgment removes the element of surprise to at least one of the litigants.

Damages properly awarded in proper amounts may not be set aside because a judgment-debtor subjectively underestimated them. Otherwise damages will routinely be subject to unrestrained reversal on appeal. That will undermine the finality of decisions so stressed by this Court.

In conclusion to Point I, it is submitted that each of the Circuit Court's departures "from the accepted and usual course of judicial proceedings" (Rule 10.1(a)) was extraordinary, and that their cumulative effect calls for this Court's supervision and eventual reversal.

POINT II

THE FOUR DEPARTURES FROM ACCEPTED PRACTICE BY THE CIRCUIT COURT SHOWN IN POINT I DENIED THE PETITIONER DUE PROCESS OF LAW AND THREATEN UNLIMITED ABUSE OF POWER BY COURTS IF PERMITTED.

Until the Circuit Court made the four departures from the usual course of judicial proceedings shown in Point I, the petitioner had a clear property right, namely, the right to compensation for his restoration services. That right had been admitted in the record in the City's answer to the complaint (JA 15), in Judge Stanton's certification of the intermediate appeal (A 73), in the City's brief on the first appeal (see supra, p. 8), and in Judge Kaufman's authorization to the petitioner to seek compensation for his restoration services (A 24).

In New York City Transit Authority v. Beazer (supra, at p. 11: 440 U.S. 568), this Court granted certiorari and reversed

under its supervisory powers because of the respondent's omission in failing to reach the statutory question in issue. Here, the same Circuit Court's departures from accepted practice were even harsher in that they consisted of the active commissions detailed in Point I.

Not only did the Circuit Court find nothing arbitrary in Judge Stanton's decision, but the Circuit Court's decision itself was arbitrary in those four departures from normal practice.

It is fundamental that, under the Fifth Amendment's limitation on the taking of property, "Arbitrary action is not due process" (Rudder v. United States, 226 F.2d 51, 53 [D.C. Cir. 1955]; Burnett v. Central Nebraska Public Power & Irr. District. 125 F.2d 836, 838 [8th Cir. 1942]; Bello v. Walker, 840 F.2d 1124, 1129 [3rd Cir. 1988], cert. den. 488 U.S.

851).

This Court has stated the principle more broadly (Marshall v. Jericho, Inc., 446 U.S. 234, 242 [1980], citing Mathews v. Eldridge, 424 U.S. 319, 334 [1976]):

> "The Due Process Clause entitles a person to an impartial and disinterested tribunal... [and] safeguards...the prevention of unjustified or mistaken deprivations... The neutrality requirement helps to guarantee that...property will not be taken on the basis of an erroneous or distorted conception of the facts or the law... At the same time, it preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done'".

The Circuit Court's decision constituted just such a "deprivation...on the basis of an erroneous or distorted conception of the facts" and "the law", in the conjunctive rather than the alternative. The errors and distortions shown in Point I portray an exercise of

unauthorized, unprecedented, and unlimited power by the Circuit Court.

That power, if unchecked, goes far beyond its effect upon this petitioner. It goes beyond the system of checks and balances built into our Constitution. If a Circuit Court can disregard accepted practice and escape review because of the difficulty in obtaining certiorari, all of the legal safeguards in our jurisprudence are at risk.

This Court's role in protecting those safeguards has been explained as follows (Supreme Court Practice, Stern, Gressman & Shapiro, 6th ed., 1986, pp. 222-3, citations omitted):

> "It is enough that four or more Justices are so doubtful of the correctness of the decision below that they desire further consideration of the case. They may be motivated by a feeling that the decision represents a gross miscarriage of justice, or a subtle erosion of a statutory or legal principle, or that the

> result reached below is unduly harsh in its impact. Or they may believe that proper supervision of the federal judiciary demands that the lower court be set aright. The Court may reasonably believe that correction of an erroneous decision...reflects the Court's error-correction function in exercising its supervisory power over the federal judicial system referred to in Rule 17.1(a)"

That Rule, now Rule 10.1(a) combines with the requirement of due process to call for certiorari and reversal here.

POINT III

THE CIRCUIT COURT'S DECISION WAS GROSSLY INEQUITABLE.

As just quoted, certiorari may be granted when "the result reached is unduly harsh in its impact".

The four departures from normal practice already discussed (Points I and II) were unduly harsh in allowing the City to avoid compensating the petitioner by "abandoning" the mural back to him. While

that appears, on its face, to put him back in the position he was in when he asserted title, the facts are strongly to the contrary for three reasons.

First, paralleling the City's successful blocking of the petitioner's claim of title since 1987, the art market has deteriorated drastically, as shown by the following testimony by Stamford's appraiser at the trial in 1992 (TR 126-7):

> "The current status of today's art market is... uncertain and bad...Prices are down substantially...My suspicion is that in this current market, which has changed from 1987, it would be very difficult to find any buyer at any price ...this year".

Returning the mural now to the petitioner at its greatly reduced value will harm him greatly while freeing the City from its repeated promises to compensate him.

Second, the City's rejection of the petitioner's title has made him bear the

heavy expenses of this litigation.

Third, even in stipulating to hold $650,000 aside to pay the judgment in lieu of an appeal bond the City "acknowledges" that it owes compensation to the petitioner (A 84).

In fine, the Circuit Court has chosen to disregard the City's pleading that it would pay the petitioner for his restoration services (A 15), the City's repetition of that to Judge Kaufman's panel (Brief, p. 18), and the City's choice to go to trial with full knowledge of its exposure (see supra, p. 7-8). This allows the City to wash its hands of the entire matter after having inflicted great hardship on the petitioner.

That is not the "equity" for which the judicial requirement is "clean hands". It is not what the petitioner deserves for his sixteen years of art restoration done,

as Judge Stanton found, "in the good faith belief that the murals were property which had been abandoned to him and that he owned them" (A 31). It is not the "equitable compensation" which Judge Kaufman's court held that he deserved (A 24).

CONCLUSION

Certiorari should be granted.

THE PETITIONER

By: Stephen A. Wise

Stephen A. Wise, for
Wise and Layton
P.O. Box 995
New Canaan, CT 06840
Tel: (203)-966-8600
FAX: (203)-966-2169

CERTIFICATE OF SERVICE

I hereby certify that on October 22, 1992, three copies of the foregoing were mailed, postage prepaid, to James V. Minor, Esq., City of Stamford Law Department, P.O. Box 10152, Stamford, CT 06904-2152.

Stephen A. Wise

Stephen A. Wise, Attorney

92-736

Supreme Court, U.S.
FILED
OCT 27 1992
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No.:

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

HIRAM H. HOELZER,

Petitioner,

v.

THE CITY OF STAMFORD, CONNECTICUT.

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI.

Stephen A. Wise,
Counsel of Record
Wise and Layton
125 Main Street
New Canaan, CT 06840
(203)-966-8600

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TABLE OF CONTENTS

The Circuit Court's second decision (as to which certiorari is sought) A 1

The Circuit Court's first decision (affirming title in Stamford) A 8

The District Court's second decision (awarding compensation) A 28

The District Court's first decision (finding title in Stamford) A 38

The District Court's opinion certifying the first appeal A 73

The Circuit Court's decision denying rehearing (first appeal) A 77

The Circuit Court's decision denying rehearing (second appeal) A 79

The Circuit Court's mandate (second appeal) A 81

The stipulation in lieu of bond (second appeal) A 83

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1615—August Term, 1991

Argued: May 19, 1992 Decided: August 13, 1992

Docket No. 92-7186

HIRAM H. HOELZER,

Plaintiff-Appellee,

—against—

THE CITY OF STAMFORD, CONNECTICUT,

Defendant-Appellant.

Before:

LUMBARD, VAN GRAAFEILAND and KEARSE,

Circuit Judges.

The City of Stamford, Connecticut, appeals from a judgment of the District Court for the Southern District of New York, Louis L. Stanton, *Judge*, awarding Hiram Hoelzer $557,200 as *quantum meruit* compensation for art restoration services he performed on murals belonging to the City.

Held: Affirmed, with modification of the judgment to allow the City of Stamford to elect to satisfy the award by returning the murals to Hoelzer within a reasonable time to be set by the district court.

STEPHEN A. WISE, New Canaan, Connecticut (Wise and Layton, New Canaan, Connecticut, of counsel), *for Plaintiff-Appellee*.

JAMES V. MINOR, Assistant Corporation Counsel, Stamford, Connecticut (Daniel M. McCabe, Corporation Counsel, Stamford, Connecticut, of counsel), *for Defendant-Appellant*.

LUMBARD, *Circuit Judge*:

The City of Stamford, Connecticut, appeals from a judgment of the District Court for the Southern District of New York, Louis L. Stanton, *Judge*, awarding Hiram Hoelzer $557,200 as *quantum meruit* compensation for art restoration services he performed on six murals belonging to the City, in the belief that they belonged to him. In this action to quiet title in October 1989, Judge Stanton entered partial judgment holding that title to the murals rested in the City. We affirmed and remanded the case for trial to determine whether Hoelzer was entitled to any compensation. After taking additional evidence, the district court awarded Hoelzer $557,200. On appeal, the City contends that Hoelzer is not entitled to equitable relief

because he did not perform the restoration work in good faith and that the damages exceed the benefits conferred and that they were excessive. We affirm but direct modification of the judgment to allow the City of Stamford to satisfy the award by returning the murals to Hoelzer, within a reasonable time to be set by the district court.

In 1934, the Works Progress Administration (W.P.A.), commissioned James Daugherty, a nationally known artist, to paint a set of six murals, each over 8 feet high and with a combined length of over 100 feet, on canvas affixed to the walls of the Stamford High School.[1] In 1970, when the school was renovated, workers removed the murals from the walls and placed them outside with other construction debris. Frank Bowne, a recent graduate of the school, discovered the murals and took them home, where he stored them in the garage.

In 1971, Bowne gave the murals to Karel Yasko, supervisor of the Fine Arts Inventory Project of the U.S. General Services Administration (G.S.A.), who placed the murals with Hiram Hoelzer, a noted art restorer in New York. In April of 1972, Hoelzer wrote to Yasko to explain the wet, dirty and damaged condition of the murals and the scope of the restoration project. Although Yasko did not respond, Hoelzer nevertheless began working to stabilize and restore the murals.

Throughout the 1970s and early 1980s, Hoelzer continued work on the murals, periodically requesting direction and compensation from Yasko, who made no response. The City did not know the whereabouts of the murals and took no steps to locate them during the 1970s. Sometime in the 1980s, at the insistence of Daugherty's

1 The facts are recited in greater detail in Judge Kaufman's thorough opinion at 933 F.2d 1131 (2d Cir. 1991).

son, the City contacted Hoelzer about the possibility of returning the murals to their original place in the Stamford High School.

Hoelzer then telephoned the G.S.A. seeking title to the murals. Meanwhile, Yasko had died, and the G.S.A. disclaimed any interest in the murals, telling Hoelzer to resolve the issue with the City. In subsequent correspondence, Hoelzer and the City each claimed to own the murals, which have been appraised by Deborah Coy Ahearn of Sotheby's at $1,250,000.

Finally, on January 10, 1989, Hoelzer brought suit in New York Supreme Court, Westchester County, seeking declaratory judgment awarding him title or alternatively recovery, in *quantum meruit*, for the value of his services in restoring and safeguarding the murals. The City then removed the case to federal court.

On October 16, 1989, Judge Stanton found that the City never abandoned the murals and still owned them. *Hoelzer v. City of Stamford*, 722 F. Supp. 1106 (S.D.N.Y. 1989). We affirmed, noting that Hoelzer could "pursue whatever claim exists for equitable compensation" for his restoration services. *Hoelzer v. City of Stamford*, 933 F.2d 1131, 1139 (2d Cir. 1991). Subsequently, on January 29, 1992, Judge Stanton found that Hoelzer had performed the restoration work in the good faith belief the murals belonged to him. Accordingly, Hoelzer was entitled to equitable compensation for his efforts. Judge Stanton heard the testimony of experts and accepted their valuation of the work done at a reasonable hourly rate, arriving at the total of $557,200. This appeal followed.

The City contends that Hoelzer performed the restoration work in the face of an adverse claim of title and thus his efforts did not meet the good faith requirement for

equitable relief and that the court erred in awarding damages of $557,200 for murals which have little or no market value. The City conceded, however, in its brief and at oral argument that Hoelzer was entitled to be paid for his restoration services. The City now asks that we vacate the judgment and remand to the district court for a new trial.

Whatever the merits of Stamford's claim that Hoelzer's work in the restoration was not performed in the good faith belief that the murals belonged to him, the conduct of the City and its representatives during the years when most of the restoration was being done, indicates that the City was quite willing to have Hoelzer proceed with the restoration. Representatives of the City visited Hoelzer's workshop from time to time in the years from 1980 through 1986. They knew of the work that Hoelzer had done and was doing to restore the murals. The City made no objection to Hoelzer's work nor did anyone ask Hoelzer the total cost of the restoration work. We have previously recognized that an "equitable remedy . . . may be granted . . . to prevent one party, at the expense of another, from retaining a benefit to which he is not entitled." *See United States v. Bedford Assoc.*, 713 F.2d 895, 903-04 (2d Cir. 1983).

Hoelzer, for his part, continued his work in the expectation that he would be compensated, but never spoke to anyone of what had to be done or how much the project would cost. In 1972, he had written Yasko of the G.S.A. that the restoration of approximately 900 sq. feet of canvas would cost $6,400. Later in 1980, Hoelzer told Mr. Nerreau, a Stamford teacher who wanted his help, that the work on a particular panel of 100" x 5' would cost about $3,000, which would, assuming uniform deterioration, suggest an amount of approximately $63,000 for all of the panels. These estimates are a small fraction of the

$557,200 which Hoelzer eventually claimed at the 1992 trial before Judge Stanton.

We find no error in Judge Stanton's finding that the value of the restoration of the murals was $557,200. *See Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973) (plurality opinion) ("In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow."). "The district court, acting in equity, has the discretionary power to fashion a remedy to do complete justice, *including a monetary award if necessary*. An appellate court will set aside such an exercise of discretion only if it is arbitrary." *Goldberg v. Medtronic, Inc.*, 686 F.2d 1219, 1229 (7th Cir. 1982) (emphasis added). Judge Stanton accepted the testimony of the experts at trial. One of them, Eugene Bechtel, a noted art restorer, had recently agreed to payment of $452,700 by the City of Norwalk for restoration of murals in the nearby city high school. This work was less complex and time consuming then Hoelzer's restoration work for Stamford. Judge Stanton's award of $557,200 is supported by substantial evidence. *See United States v. Bedford Assoc.*, 713 F.2d at 902 (equitable remedy rests in the sound discretion of the district court); *Liberty Nat'l Bank and Trust Co. v. Life Ins. Co. of Cincinnati*, 901 F.2d 539, 547 (6th Cir. 1990); *United States v. City of Chicago*, 631 F.2d 469, 472 (7th Cir. 1980).

Nevertheless, from a review of the evidence, it is clear that the City of Stamford could have had no idea that the cost of restoring the murals would come to as much as $557,200. When it claimed ownership of the murals and conceded that Hoelzer should receive some compensation for his labors, the City could not reasonably have expected that Hoelzer would claim nearly as much as $557,200. Equitable compensation should not unduly

prejudice the party which would otherwise receive the benefit. *See Alden Auto Parts Warehouse, Inc. v. Dolphin Equip. Leasing Corp.*, 682 F.2d 330, 333 (2d Cir. 1982). On the equities, we cannot say that Stamford should be compelled to pay any such amount unless it is willing to do so.

Accordingly, we hold that the City may satisfy the judgment by abandoning its ownership of the murals and returning them to Hoelzer within a reasonable time to be fixed by the district court. If the City elects to retain the murals, the judgment against it for $557,200 is affirmed.

No costs to either party.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 724—August Term 1990

(Argued April 26, 1991 Decided May 28, 1991)

Docket No. 90-7160

HIRAM H. HOELZER,

Plaintiff-Appellant,

—v.—

THE CITY OF STAMFORD, CONNECTICUT,

Defendant-Appellee.

Before:

KAUFMAN, NEWMAN AND KEARSE,

Circuit Judges.

Hiram Hoelzer appeals from a judgment of the district court for the Southern District of New York (Stanton, J.) finding that title to certain mural paintings rests with the City of Stamford, the art work's original owner.

Affirmed. Judge Newman concurs in a separate opinion.

STEPHEN A. WISE, Wise & Layton, New Canaan, CT, for *Plaintiff-Appellant*.

JAMES V. MINOR, Stamford Law Department, Stamford, CT (Mary E. Sommer, Corporation Counsel, Deborah M. Steeves, *of counsel*), for *Defendant-Appellee*.

KAUFMAN, *Circuit Judge*:

The value of art, reflected in staggering prices paid at auction for works by masters such as Van Gogh, has skyrocketed in recent years. Collectors from all over the world have shown a willingness to pay exorbitant sums for the privilege of privately exhibiting paintings, many of which the artists could not sell during their lives. With this increase in value has come the inevitable increase in theft and illegitimate trade. It is not uncommon, however, for purchasers of fraudulently obtained art work to make their acquisitions from reputable art dealers and galleries.

When an original owner of a missing piece of art asserts a claim for repossession against one who has purchased the work in good faith, a crucial legal issue is presented involving accrual of the cause of action—that is, when the statute of limitations begins to run on the owner's claim. If a possessor can somehow prove the owner waited too long to bring suit, then the art work will remain where it is and will not be returned.

Though this case does not involve stolen art *per se*, it does address that conflict which arises between an origi-

nal owner and one asserting a claim of rightful possession, a topic of some recent debate among the courts.

Hiram H. Hoelzer, plaintiff-appellant, is a professional restorer of art with a workshop and studio in New York City. In 1971, an emissary of the General Services Administration in Washington, D.C. delivered to Hoelzer six large mural paintings for storage and restoration. Hoelzer understood he would eventually be compensated for his efforts in restoring the art work, which he believed was property of the federal government. The murals, in fact, belong to the City of Stamford (the "City"), defendant-appellee. They were designed to hang on the walls of Stamford's public high school, and this they did from 1934 until the 1970's, when they were inadvertently discarded by construction workers.

In an action seeking a declaratory judgment to quiet title to the murals, Hoelzer contended, *inter alia*, that the statute of limitations for appellee's claim in replevin had run before the City asserted ownership to the murals and, in any case, that the City had repudiated its rights by abandoning the art work in 1970. A trial was held in district court for the Southern District of New York before Judge Stanton, who entered a partial judgment in favor of the City in October of 1989. Hoelzer filed an interlocutory appeal with this Court. *See* 28 U.S.C. § 1292(b) (1988).

Alternatively, Hoelzer seeks compensation, in *quantum meruit*, for his efforts in safeguarding and beginning restoration of the panels. A trial on that claim awaits resolution of the instant appeal.

For the following reasons, we affirm the judgment below and remand the case to the district court for

determination of the value of Hoelzer's restoration services.

FACTS

President Franklin D. Roosevelt's administration created the Works Progress Administration (the "W.P.A.") to provide useful public work to the country's vast number of unemployed citizens during the depression of the 1930's. Employing millions of workers in its eight years of operation, the W.P.A. generated construction and improvement of numerous roads, bridges, buildings and other structures. One element of the program was a project designed to sponsor work in the visual, theatrical and literary arts. Among its other achievements, the arts project generated creation of thousands of murals for display in public buildings around the country.

In 1934, the W.P.A. commissioned the artist James Daugherty to paint a set of six murals for the walls of Stamford High School, a public school operated by defendant-appellee, City of Stamford, in Connecticut. Daugherty painted the murals on light-weight canvas panels which were then affixed to the walls of a music room in the school. The murals remained there from 1934 until 1970, when the entire school underwent major renovation.

Measuring over eight feet tall and more than one-hundred feet long, the complete work depicts an array of scenes involving public figures, events and issues of Daugherty's era. The six panels were painted with vibrant colors, in a style Hoelzer termed "Early American Expressionism," and were entitled: "Education;"

"American Rhythm;" "New England Traditions;" "Tragedy-Comedy;" "Sports Frenzy;" and "Science." Three of the panels are signed and dated.

During the course of planning and executing renovation of Stamford High School, various people expressed interest in conservation of the Daugherty murals. In 1967, architects supervising the project wrote to the Superintendent of Schools recommending that the murals be removed in order to avoid inevitable damage due to construction work. The Superintendent wrote back, indicating that the Board of Education agreed the murals should not be harmed in any way, and instructed they be removed and rolled for storage. In addition, Roger Preu, head of the high school art department, recommended to several City and school officials that the murals be carefully preserved.

During the summer of 1970, renovation on the school was begun. At that time, apparently unknown to vacationing school officials and without authorization, workmen removed the murals from the music room walls and placed them, with other construction debris, in a heap near the outside dumpster.

Fortunately, a graduating high school student, Frank Bowne, noticed the panels rolled up and resting close to the trash. Recognizing their value, Bowne rescued them. He brought the murals to his parents' garage in Stamford, where his mother became their unofficial custodian while he went off to college. A year later, in the summer of 1971, an article in U.S. News & World Report, entitled "W.P.A. Art: Rescue of a U.S. Treasure," caught Bowne's attention. The article described the efforts of Mr. Karel Yasko, Supervisor of the Fine Arts Inventory Project of the General Services Adminis-

tration ("G.S.A.") of the federal government, to locate and preserve W.P.A. art. Bowne wrote to Yasko, describing the Daugherty murals and suggesting they be restored and relocated. Yasko thanked Bowne for his efforts and indicated he would send his summer intern, Stewart Rosenblum, to retrieve them.

In autumn of 1971, Rosenblum went to Stamford and was given the roll of panels by Bowne's mother. Then, on Yasko's instructions, he delivered them to Hiram Hoelzer, an art restorer in nearby Armonk, New York. Rosenblum recalls: "It was my understanding that Mr. Hoelzer was to store the murals on behalf of the United States Government, stabilize them and restore them when money could be found, returning them to the United States Government when so instructed." Hoelzer accepted the murals from Rosenblum and brought them to his workshop in Manhattan.

In the meantime, upon his return from summer vacation, Mr. Preu, of the school's art department, noticed the murals were gone and made several unsuccessful inquiries as to their location. During the next five or six years, Preu discussed the missing murals with various teachers and school administrators but took no further action. There is no evidence that any other school or City official discussed or pursued the matter during that period.

It is undisputed that the murals were in poor condition—wet, torn and dirty—when Hoelzer received them in 1971. In April of 1972, Hoelzer wrote to Yasko describing the state of the murals, the scope of the necessary restoration work and the expected cost. Hoelzer and his assistants embarked upon the massive restoration project and safely stored the murals over the years.

Seeking compensation for his efforts, Hoelzer, as we have indicated, has also instituted an action against the City for payment *in quantum meruit*. Trial on that issue has been postponed pending resolution of the instant appeal.

In 1972, Yasko wrote to Charles Daugherty, the deceased artist's son, informing him of the murals' location. In the late 1970's, Daugherty told John Nerreau, Director of Art and Music for the Stamford Public School System, that the murals still existed. City officials were not given the location of the panels, however, until 1980, when April Paul, a Ph.D. candidate in art history, discovered they were in Hoelzer's possession and took it upon herself to relay this information to Stamford school officials.

Shortly thereafter, Nerreau visited Hoelzer's studio in order to view the murals. In his report to the school superintendent, Nerreau described his conversation with Hoelzer, who assured him that successful restoration of murals was possible but that it would be quite costly. Nerreau recommended that the Mayor of Stamford be consulted regarding both financing of the restoration work and relocation of the murals to a civic area in the City.

Though Hoelzer claims to have indicated to Nerreau during their 1980 meeting that he intended to retain possession of the murals, the lower court found he made no such assertion until a second meeting with City officials six years later.

A year went by after Nerreau's visit, during which time no one from the federal or City government communicated with Hoelzer. Greatly frustrated, Hoelzer

called Yasko in 1981, complaining that the G.S.A. had abandoned the Daugherty project and had failed to compensate him for years of storing the huge panels and for his preliminary restoration efforts. During that conversation, Michael Ragone, an art restorer employed by appellant, claims to have overheard Hoelzer tell Yasko that "everything had been dumped on him and that the murals were his." There is no evidence any such claim was made to City officials prior to 1986.

In 1986, Marguerite Strop, Director of Public Art for the City of Stamford, was investigating the City's collection of New Deal Art and was given appellant's name by the G.S.A. Strop went to Hoelzer's studio shortly thereafter. She examined the panels and indicated to Hoelzer that she would apply to the National Endowment for the Arts, on the City's behalf, for a grant to cover the costs of restoration. Hoelzer, however, "refused to cooperate" and later called the G.S.A. seeking an "ownership disclaimer" to the Daugherty murals. By this time, Mr. Yasko had died. In response to Hoelzer's inquiry, another G.S.A. official sent Hoelzer a copy of a 1934 policy statement of the Public Works of Art Project directing:

> All works of art executed with the intent that they should occupy a particular place in some public building are to be treated as a part of that building.

The G.S.A. informed Hoelzer, "[t]he Stamford High School murals fall within that category, and as such are not within the purview of ownership and/or maintenance by the Federal Government. We therefore suggest that this matter be resolved directly with Stamford High School."

Soon after Ms. Strop's visit, Stamford's Corporation Counsel wrote to Hoelzer stating that the murals belonged to the City and requesting their return. One month later, in October 1986, Hoelzer responded to the Corporation Counsel, asserting:

> The murals were knowingly trashed by Stamford more than fifteen years ago. . . . As such, Stamford has no legal claim to them. . . . They belong to me. . . . I am willing to sell them for a fair value.

The Corporation Counsel replied:

> . . . [T]hese murals were not "knowingly trashed" by Stamford, the murals were illegally removed by a third party.
>
> As your April 25, 1972 letter to Mr. Yasko indicates, you knew these murals did not belong to you, you were merely restoring and safeguarding them for a fee. You cannot now claim these murals to be yours.

The murals are of substantial value. They have been appraised by Sotheby's at $1.25 million and, alternatively, by the firm of Connecticut Fine Arts at between $90,000 and $100,000.

Eventually, in 1989, Hoelzer brought an action against the City of Stamford in the Supreme Court of New York, Westchester County, seeking a declaratory judgment to quiet title in the murals. The City removed the case to federal court. A trial was held on partially stipulated facts before Judge Stanton of the district court for the Southern District of New York. On October 17, 1989, the court filed its opinion and order find-

ing that the murals belong to the City of Stamford. This appeal ensued.

DISCUSSION

On appeal, Hoelzer asserts that the district court erred in finding title to the murals continued to rest with the City of Stamford. He claims that the City unreasonably delayed its demand for return of the art work and, accordingly, that the statute of limitations for its claim had run prior to this action. He also contends that the City abandoned the murals in 1970, thereby precluding any claim of ownership.

A. Statute of Limitations

Because jurisdiction over this federal action is based on diversity, we must apply the substantive law of the forum state, including its rules governing the appropriate choice of law. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941); *Rosenthal v. Warren*, 475 F.2d 438, 440 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973). And, as modern choice of law precepts dictate, "a state with substantial ties to a transaction in dispute has a legitimate constitutional interest in the application of its own rules of law." *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553, 559 (2d Cir. 1962) (*en banc*), *cert. denied*, 372 U.S. 912 (1963).

New York law indicates that actions accruing within the state are controlled by the local statutes of limitations. Statutes of other jurisdictions may apply to actions accruing out of state, by virtue of New York's "borrowing statute," so long as they impose shorter limitation periods than do local laws. N.Y. Civ. Prac.

L. & R. § 202 (McKinney 1990). Accordingly, since the instant action accrued in New York State—where demand for return of the murals was made and refused—the district court properly looked to New York law for the governing statute of limitations. It found the answer in New York Civil Practice Law & Rules § 214(3), which dictates that actions "to recover a chattel or damages for the taking or detaining of a chattel" must be commenced within three years. On appeal, the parties debate whether the district court erroneously determined that the three-year statutory period began to run in 1986.

In a case with facts somewhat similar to those before us, this Court resolved an ownership dispute between a West German National and an American good faith purchaser over a painting by Claude Monet, which had disappeared from Germany shortly after World War II. *DeWeerth v. Baldinger*, 836 F.2d 103 (2d Cir. 1987), *cert. denied*, 486 U.S. 1056 (1988). We held that where an owner proceeds against a rightful possessor of property, "the limitations period begins to run only when the owner demands return of the property and the purchaser refuses." *Id.* at 106. We went on to note, however, that "[w]here demand and refusal are necessary to start a limitations period, the demand may not be unreasonably delayed." *Id.* at 107. Construing available New York law to impose an obligation of due diligence upon owners searching for lost property, we reversed a district court judgment in favor of Mrs. DeWeerth on the basis that her efforts to locate the missing Monet, over the course of thirty years, had been insubstantial.

In the present case, the district court found Hoelzer "did nothing until 1986 that might have alerted the City

to an adverse claim," and thus it found the City had no earlier notice of Hoelzer's intent to keep the murals. Applying the guidelines set forth in *DeWeerth*, the court found the City had not failed to act with due diligence because, until 1980, there was no clear evidence the murals were missing rather than in storage. The court also ruled that because after 1980 the City believed Hoelzer held the murals as a custodian only, it did not unreasonably delay its demand for their return. Rejecting Hoelzer's contentions, the district court held that in order for an original owner of property to have a claim against a rightful possessor, the owner must first make a demand for the property's return. The court went on to state that such demand may not be "unreasonably delayed" and, thus, because the City's demand on Hoelzer was not untimely, the statute of limitations had not run on its claim.

Judge Stanton's statement of New York law remains correct with respect to the requirement that an owner must make a demand for return of goods in order for a claim in replevin to accrue and the three-year statute of limitations to begin to run. A recent ruling of the New York Court of Appeals, however, has removed the issue of unreasonable delay from this context. *See Solomon R. Guggenheim Foundation v. Lubell*, 77 N.Y.2d 311 (1991).

New York's *Lubell* case involved a dispute over a gouache water color by Marc Chagall which had been stolen from the Guggenheim Museum and was ultimately purchased, in good faith, by art collectors from a reputable New York City gallery. The Lubells displayed the Chagall in their home for more than twenty years before the Guggenheim informed them that the

piece belonged to the museum and demanded its return. When it originally discovered the theft, the museum had not notified the authorities, for fear that doing so would drive the painting further underground and would greatly diminish the chances for its recovery.

The trial court, relying on *DeWeerth*, found the Guggenheim had not used due diligence to discover the location of the painting and, thus, had unreasonably delayed its demand upon the Lubells. The court, therefore, found the museum's claim was time-barred and granted summary judgment in favor of Mrs. Lubell. The Appellate Division dismissed the Lubells' statute of limitations defense, however, finding the museum was under no due diligence requirement with respect to that defense, and the New York Court of Appeals affirmed. The case was remanded for disposition of Mrs. Lubell's alternate defense of laches.

This Court decided *DeWeerth* in the "absence of controlling state authority," inferring that under New York law there exists "a duty of reasonable diligence in attempting to locate stolen property, in addition to the undisputed duty to make a demand for return within a reasonable time after the current possessor is identified." *DeWeerth*, 836 F.2d at 108. Contrary to our interpretation, however, the New York Court of Appeals later stated in *Lubell* that New York law does not impose such a duty on the owners of stolen art work for statute of limitations purposes. The state court found the demand and refusal rule adequately addresses the parties' competing interests, ruling ". . . there is no reason to obscure [the] straightforward protection of true owners by creating a duty of reasonable diligence." *Lubell*, 11 N.Y.2d at 319.

Underlying the New York court's decision to dispense with the due diligence requirement was an awareness that lost art is extremely difficult to recover, and a policy determination that the burden of proving ownership should not be shifted onto the "wronged owner" who has already suffered the theft of valuable property.

Sufficiently apprised of the relevant New York law, we find that running of the statute of limitations with regard to the City of Stamford's repossession claim was not affected by a due diligence requirement. *See also Golden Budha Corp. v. Canadian Land Co. of America, N.V.*, No. 90-7676, slip op. 3781, 3791 (2d Cir. April 22, 1991); *Republic of Turkey v. Metropolitan Museum of Art*, 1990 U.S. Dist. LEXIS 18771 (S.D.N.Y. July 16, 1990). And, though *Lubell* speaks specifically to disputes over stolen art, the principle that an owner need not act with due diligence before demanding return of her property, applies even more clearly to the facts at hand. The City of Stamford had no reason to believe its possessory interest was ever in jeopardy, let alone that a diligent search was required.

Thus, the cause of action accrued in 1986, when appellee made its first demand for return of the Daugherty murals and Hoelzer refused. Since the action was brought within the three-year statute of limitations, adjudication of the City's ownership claim is not time-barred.

While the court in *Lubell* found due diligence has no impact on running of the statute of limitations in actions for replevin, it noted the doctrine's relevance with regard to the affirmative defense of laches. A panel of this Court perceptively distinguished the defense of

laches from one involving the statute of limitations in *DeWeerth*, noting:

> Laches is an equitable defense that requires a showing of delay and prejudice to the defendant, whereas the reasonably prompt demand principle involved in this case is a legal doctrine based exclusively on an unexcused lapse of time.

DeWeerth, 836 F.2d at 110. The doctrine of laches sufficiently safeguards the interests of a good faith purchaser of lost art by weighing in the balance of competing interests the owner's diligence in pursuing her claim.

In the present case, though Hoelzer did not explicitly assert a defense of laches, he nonetheless would have failed to establish the prejudice necessary to sustain such a claim. The district court found that Hoelzer, who paid nothing for the murals and who never anticipated a propriety interest in them, would, in fact, receive a windfall were he granted title. The expenses Hoelzer incurred maintaining and restoring the panels will be considered when his pending action for compensation is adjudicated.

B. Abandonment

Abandonment of property requires a confluence of intention and action by the owner. Accordingly, before possessory rights will be relinquished, the law demands proof both of an owner's intent to abandon the property and of some affirmative act or omission demonstrating that intention. This well-settled doctrine has long been incorporated in the law of New York:

> The abandonment of property is the relinquishing of all title, possession, or claim to or of it—a vir-

> tual intentional throwing away of it. It is not presumed. Proof supporting it must be direct or affirmative or reasonably beget the exclusive inference of the throwing away.

United States v. Cowan, 396 F.2d 83, 87 (2d Cir. 1968) (*quoting Foulke v. New York Consol. R.R. Co.*, 228 N.Y. 269, 273 (1920)).

Because proof of abandonment turns on the issue of intent, courts must take into consideration all relevant facts, especially those pertaining to conduct of the parties. The burden of proof rests with the party claiming ownership by default. Unless the district court was clearly erroneous in its analysis of the facts, we should not reverse the findings below.

Judge Stanton, in our view, correctly found no compelling evidence that the City intended to relinquish ownership of the Daugherty murals. Nor did he find the City to have performed or condoned affirmative acts indicating purposeful repudiation of its property rights. On the contrary, the court interpreted a letter written by the City's Superintendent of Schools, prior to renovation of the high school, as clear evidence of the City's intention to retain the murals. The letter stated that the Board of Education wished the architects to "remove [the mural] from the wall and roll it for proper storage." And, though these instructions were inadvertently disregarded by construction workers, that did not reflect a shift in municipal policy.

Similarly, the court did not infer from the City's less than vigorous investigation into the location of the murals an intentional abandonment. Judge Stanton noted that before 1980, only Messrs. Hoelzer, Yasko

and Bowne knew where the panels were, and, that during this time, none of them bothered to inform the City of the location or to ask if it desired their return. "For all City officials knew," wrote the court, "the mural was properly in storage." Thus, the district court concluded that Hoelzer had failed to establish the essential elements of abandonment, and it properly dismissed the claim.

CONCLUSION

In conclusion, we note that this case gives us an opportunity to implement what has become the law of the State of New York, namely, that there is no due diligence requirement affecting running of statute of limitations in actions for repossession of lost or stolen art.

Because art work can be both extremely valuable and highly marketable to an underground clientele, the difficulties original owners face in recovering missing art abound. Recognizing this dilemma, the New York Court of Appeals adopted a policy tailored to alleviate that burden. Thus, the relevant statute of limitations begins to run upon the owner's demand for return of the art work and the possessor's refusal, regardless of the apparent intensity of the owner's search up until that point.

Accordingly, the City's claim is barred neither by the statute of limitations nor by the doctrine of abandonment. The W.P.A. murals remain, as intended, property of the public. Mr. Hoelzer may, if he seeks to, pursue whatever claim exists for equitable compensation. The judgment is affirmed.

JON O. NEWMAN, *Circuit Judge*, concurring:

The formulation of sound rules for resolving disputes concerning the right to possession of stolen art is not an easy task, and the soundness of the rules adopted for such disputes may well be perceived rather differently depending on the perspective of the contestants. In some situations, a work of art is in possession *of* a museum, where it has remained for many years after purchase from a reputable dealer; it subsequently develops that the work was stolen from its original owner, who years after the theft claims the property from the museum. In other situations, a work of art is stolen *from* a museum, which ultimately locates the work and claims it from the possessor who may have purchased the work from a reputable dealer. Museums in possession of stolen art will probably think it preferable to fashion rules that place some obligation on owners to act with diligence in seeking to locate works they claim were stolen from them. On the other hand, museums that are the victims of theft will probably think it preferable to have rules that minimize the obligation of owners to locate their stolen property. Since it is likely that museums are more frequently good-faith purchasers or innocent donees of stolen art than victims of art thefts, they probably would prefer rules that tilt slightly in favor of possessors, at least with respect to a duty of theft victims to act with some diligence in locating stolen art.

In *DeWeerth v. Baldinger*, 836 F.2d 103 (2d Cir. 1987), *cert. denied*, 486 U.S. 1056 (1988), a New York diversity case, we noted the New York rule that the statute of limitations for recovery of stolen property begins to run from the time when a person who claims the property was stolen from him locates it and his demand for its return is refused, but, in the absence of authori-

tative New York law, we added a qualification that the theft victim must exercise reasonable diligence in endeavoring to locate the property. *Id.* at 107, 110. That qualification would have provided some comfort to museums that innocently purchase stolen art.

Thereafter, a case arose in the New York courts in which a museum that was the victim of an art theft asserted its claim for possession. The New York Court of Appeals ruled that, for purposes of the statute of limitations, New York law contains no requirement of due diligence on the part of the original owner in locating property allegedly stolen from it. *Solomon R. Guggenheim Foundation v. Lubell*, 77 N.Y.2d 311, 567 N.Y.S.2d 623 (1991). However, the Court also ruled that the diligence of the original owner in seeking to locate its property was a relevant consideration in applying the doctrine of laches. *Id.* at 321, N.Y.S.2d at 628 ("[The possessor's] contention that the museum did not exercise reasonable diligence in locating the painting will be considered by the Trial Judge in the context of her laches defense."). The result of this decision is to permit a court encountering a dispute between a theft victim and a good-faith possessor to consider and balance all the equities, including the reasonableness of the efforts the theft victim made to locate the property and the reasonableness of the possessor's basis for believing that it was entitled to obtain and keep the property.

Such a broad inquiry will permit a sensitive resolution of difficult disputes in which there is often much to be said for the positions of each of the contending sides. Now that New York has authoritatively advised us that the diligence of the original owner is to be considered not in determining accrual of the statute of limitations,

as we thought in *DeWeerth*, but only in assessing the equities under the doctrine of laches, we must apply that approach to all cases governed by New York law. Since Judge Kaufman's opinion carefully applies the learning of *Lubell* to the facts of the pending case, I readily concur in his thorough opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
89 Civ. 0641 (LLS)

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HIRAM H. HOELZER,

Plaintiff,

- against -

THE CITY OF STAMFORD, CONNECTICUT

Defendant.

----------x

MEMORANDUM OF OPINION

The following determinations, made at the conclusion of this nonjury trial, rest on my observations of the witnesses, the exhibits in evidence, and on matters otherwise of record in this case.

Although in the course of this discussion I will occasionally refer to a specific item of evidence or give a narrower reason for a conclusion that I reach, I have reached such conclusion on the basis of what I find to be the preponderance of the credible, reliable, persuasive and coherent evidence in the

case as a whole as well as the particular illustrative reason that I specify.

I will start, as the case did, with the appraisal of the mural.

I find Mr. Chernow's appraisal unreliable. Mr. Chernow's information that portions of the mural had been repainted came from the artist's son, and not from his own inspection. When making his original appraisal, he did not examine the mural but photographs of it. He was unaware of the amount of reconstruction that had been done on the mural, and had never appraised or sold a mural. His testimony to the effect that a fair price for the mural might be five times the highest price ever obtained for Daugherty's other work is no more than speculation.

Mr. Rathbone's appraisal of $1,250,000 is also unreliable. For lack

of comparable sales his conclusion as to fair market value is little more than an educated guess, admittedly subjective, and Mr. Rathbone agreed the mural could sell for less than half or almost twice the amount of his estimate.

There may, as a practical matter, be little if any market for the mural. The price at which it might sell may or may not lie between the two appraisals, but any conclusion as to where it lies is too speculative to support a judgment.

Whatever ultimate value the mural will have may be a concern of its owner, the City of Stamford. It is not or primary concern to the restorer, whose efforts have indisputably contributed to that value as compared with what the murals were worth when they were wet, torn, and dirty. The value of a painting is not a determinative measure of the

value of restoration services, and paintings are occasionally restored at costs greater than their value.

The City claims that Mr. Hoelzer acted improperly in proceeding with the restoration without authorization from, or a contract with, the City of Stamford.

I find that the plaintiff was not a volunteer in the sense of one dealing with another's property, but proceeded in the good faith belief that the murals were property which had been abandoned to him and that he owned them, a position he maintained until not only this court but the Court of Appeals ruled to the contrary.

Thus, his actions do not fall under the Restatement of Restitution § 112 (1937), cited by the defendant, which applies to one who confers a benefit on another unconditionally and without

mistake. Nor does his position fall under the cases the defendant cites (Hartford Fire Insurance Company v. Albertson, 59 Misc.2d 207, 298 N.Y.S.2d 321 (1969); Allstate v. Reeves, 440 So.2d 1086 (Ala. Civ. App. 1983)) where persons added value to property they knew they did not own. Nor is this a case of restitution in the common sense of the term.

Nor, despite the caption of the second claim in the complaint, is it a claim under quantum meruit. Recovery in quantum meruit arises where a contract may be implied in fact, and a contract may not be implied in fact when the facts are inconsistent with its existence. See Murray v. National Broadcasting Co., 671 F. Supp. 236, 245 (S.D.N.Y. 1976) (citation omitted); Miller v. Schloss, 218 N.Y. 400, 406-07 (1916). Here both the plaintiff and the defendant agreed that

there was no contract.

However, the law will imply a contract when none exists if equitable principles show that the defendant has been unjustly enriched. "The theory of unjust enrichment is the existence of an obligation created by law because someone has obtained something of value 'under circumstances that in equity and good conscience he ought not to have retained it.'" Lengel v. Lengel, 382 N.Y.S.2d 678, 681 (1976) (quoting Miller, supra at 407).

This is a case in equity. As stated by the Court of Appeals in the last sentence of the majority opinion: "Mr. Hoelzer may, if he seeks to, pursue whatever claim exists for equitable compensation." Hoelzer v. City of Stamford, 933 F.2d 1131, 1139 (2d Cir. 1991).

Thus it remains to determine the amount which will equitably compensate Mr.

Hoelzer for his efforts and his activities with respect to the murals.

It may be that other qualified restorers would have approached the task of repair differently and at different costs. Mr. Farancz's affidavit and testimony tend to the conclusion that he would have performed the work differently: he would have lined the mural, and he states that he would have completed his repair program at less cost. However, his opinion rests on the observation of only six imperfect pictures showing relatively small portions of the mural, so for that reason and others I do not accept his broad conclusions as to how the work could or should have been done, or at what cost.

Specifically, I also reject his conclusion that the murals should have been lined, and I accept Mr. Hoelzer's use of chartex as resting upon superior

artistic and professional judgment and a much better knowledge of the mural, and as a determination reached in the belief that he was the party who would bear the cost and enjoy the benefit of his processes.

I have considered whether a discount should be applied for the portion of the work that was done by his assistant, Mr. Guldbrandsen. After weighing that factor, I apply no discount for it. There is no quantification in the evidence by which such a discount could be made with accuracy or assurance. There is testimony that such discounts are not routine in the industry.

This brings me to the reasonableness of Mr. Hoelzer's claim that he should be compensated at a rate of $1600 per day -- that being the figure which applies to the great body of his work and the highest figure he asks.

I have concluded that the $1600 per day figure is a reasonable one. It represents $200 per hour for an eight-hour day. There is no credible challenge, and little challenge of any nature, to the number of days that he put into the work, and thus I accept the arithmetic which leads to compensation for his work in the amount of $557,200. That figure finds general support by comparison to the circumstances under which the restorer of the Norwalk murals, Mr. Bechtel, will receive approximately $452,700, as well as finding support in the expert opinion of witnesses who are qualified in the field. Mr. Bechtel's compensation for the Norwalk murals was set by free contract, and his work on those murals was smaller in scale and considerably less complex that Mr. Hoelzer's work on the Daugherty mural.

Since it was necessary for Mr.

Hoelzer to have possession of the murals in order to perform his work on them, and since his possession since 1981 was also consistent with his position that he owned them, and since the award that I have allowed provides full equitable compensation to Mr. Hoelzer under all of the circumstances, this award will not be increased by an addition for storage or for interest.

On this equitable case as a whole, I deny prejudgment interest on the award as a matter of discretion. N.Y. CPLR § 5001(a).

Accordingly, judgment will be entered in favor of Mr. Hoelzer in the amount of $557,200 with costs and disbursements according to law.

Dated: January 29, 1991
New York, New York

/s/ Louis L. Stanton
LOUIS L. STANTON
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
89 Civ. 0641 (LLS)

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HIRAM H. HOELZER,

Plaintiff,

- against -

THE CITY OF STAMFORD, CONNECTICUT

Defendant.

----------x

OPINION and ORDER

Hiram Hoelzer, a professional art restorer, seeks a declaratory judgment to quiet title to a mural originally affixed to the walls of Stamford High School. At a pre-trial conference on May 12, 1989 plaintiff and defendant City of Stamford (the "City") agreed to a trial on stipulated facts on the issue of title to the mural.

Mr. Hoelzer contends that the City abandoned the mural, and that its claim of ownership is time-barred. The City contends that its claim is not barred by the statute of limitations because it did

not know that Mr. Hoelzer claimed ownership of the mural until 1986.

FACTS

As part of the Works Progress Administration ("W.P.A.") of the United States, James Daugherty painted a large mural[1] on the walls of Stamford High School (the "School") in 1934. The mural, about eight feet high and over 100 feet long, depicts a "variety of scenes representing life...Scenes vary from an area depicting drama to the political crash of Wall Street with a cliche politician, cigar in mouth and money in hand. Others seem to be of urbanization and industrialization and social unrest or change."[2]

In the late 1960's the City decided to renovate the School. The architects

1 & 2: All footnotes by the Court are collected at the end of the opinion.

planning the renovations wrote to Dr. Joseph Porter, the City's Superintendent of Schools, advising him that

> [T]he mural will be subject to damage from several causes ... It would be better, in our opinion, to have the mural removed from the building permanently. If it is desired to preserve the mural, possibly the local historical society or some similar agency would provide a suitable repository. If it is to be thus preserved, the mural should be removed prior to the start of actual Phase I construction work.[3]

Dr. Porter responded:

> At the regular meeting of the Board of Education held on march 29, 1967, it was decided that the mural in question should not be damaged in any way, and, therefore, you are requested to remove it from the wall and roll it for proper storage.[4]

No other communications took place between School or City officials and the architects regarding the mural.

However, in 1968 Roger C. Preu, head of the School's art department, asked an

architect on the renovation not to do anythng with the mural before contacting him, told the city's Clerk of the Works to save the mural, and also

> told several people, including the school's principal, that if the murals were going to be thrown out they should be saved, that there were many famous local people who were in the murals and that, if worse came to worst, sections could be cut out and auctioned off for an art scholarship for children . . . rather than just getting rid of them.[5]

During the School's 1970 summer vacation workmen took the mural down, and either they or others put the mural "outside on top of a heap of construction trash which was either next to a dumpster outside of the school building or overflowing from the dumpster."[6]

When Mr. Preu returned from his 1970 summer vacation and noticed the mural was gone, he asked the workmen, a School custodian, and the School's principal

where it was but none knew. Over the next five or six years, he discussed the mural's disappearance with School teachers and administrators.[7]

Frank Bowne, a 1970 graduate of the School, found the mural cut into 30 pieces and "rolled up together in a pile of trash next to the school. Not knowing what [he] was going to do with it but appreciating its age and era [Mr. Bowne] managed to get it into [his] car and drove home."[8]

On August 25, 1971 Mr. Bowne wrote to Mr. Karel Yasko explaining his finding of the mural and "invit[ing] you to come see it to consider restoration and relocation."[9] Mr. Yasko, until his death in 1985, worked for the General Services Administration ("G.S.A.") maintaining its Fine Arts Inventory Project and supervising restoration of W.P.A. artwork.

Mr. Yasko replied on September 27,

1971:

> For your singular gesture of rescuing the James Daugherty mural from the trash pile you are to be commended . . . .
> . . . .
> We are most certainly interested in restoring, preserving and relocating the mural, preferably in the community and in a location where it would receive maximum exposure. the high school would be a logical place but they already indicated their opinion when it was consigned to the trash pile.[10]

Mr. Yasko suggested that Stewart G Rosenblum, his former summer intern, inspect the mural at Mr. Bowne's home.

With Mr. Bowne's permission[11], Mr. Rosenblum took the mural in October 1971, and, at Mr. Yasko's direction, delivered it to Mr. Hoelzer's home in Armonk, New York. Mr. Rosenblum recalls:

> The murals were given to me as a donation by the young man to the United States Government and I delivered them in the loosely rolled up or folded condition (I don't remember which) in which I had received them to Mr. Hoelzer on behalf of the United States

> Government. It was my understanding that Mr. Hoelzer was to store the murals on behalf of the United States Government, stabilize them and restore them when money could be found, returning them to the United States Government when so instructed. It is my recollection that Mr. Yasko followed this procedure in other instances.[12]

Mr. Hoelzer then brought the mural to his studio and workshop in Manhattan.

In an April 25, 1972 letter to Mr. Yasko, Mr. Hoelzer explained the deteriorated condition of the mural in detail and what its restoration would entail:

> Restoration:-
> Remove glue, flatten canvases, clean paintings, retouch, prevent further flaking, and roll them (and identify), ready for storage or rehanging There [sic] are about 900 square feet of canvas so it is quite a job.
> Cost:- $ 6,400.-[13]

During the 1970's neither the City nor the School took any steps to locate the mural or ascertain whether it was

properly in storage.

Charles Daugherty, the artist's son, received a letter in January 1972 from Mr. Yasko, and learned from him that Mr. Hoelzer had the mural.[14]. In the late 1970's Mr. Daugherty indignantly told Mr. Hoffman, who had been president of the City's Board of Education during 1971, that the murals were still in existence. Mr. Hoffman apparently asked Dr. Thomas F. Reardon, Acting Superintendent of Schools, to look into the issue.[15] At Dr. Reardon's direction, Mr. Nerreau, Director of Art and Music for the Stamford Public School System, visited Mr. Hoelzer at his studio in December 1980. According to Mr. Hoelzer and one of his employees, Mr. Nerreau claimed that the mural belonged to the City. (Mr. Nerreau disputes this assertion).[16] On December 10, 1980 Mr. Nerreau prepared a report for Dr. Reardon

in which he stated:

> Hiram Hoelzer assures me the restoration can be done to renew these murals to the vibrancy in which they originally were. However it is very costly. He quickly stated a particular panel 100" x 5' would cost about three thousand dollars.
> I recommend we talk to the mayor about possibilities of use in the civic area of the city and applying for a federal grant . .
> . . . .
> Please advise where we go from here.[17]

Dr. Reardon did not advise Mr. Nerreau with respect to the mural.

April J. Paul, a Ph.D. candidate at he City University of New York, also visited Mr. Hoelzer at his studio in 1980. In the course of researching James Daugherty's work, Ms. Paul had learned of the mural and spoken to Mr. Yasko who told her that Mr. Hoelzer had the mural. In a thank-you note to Mr. Hoelzer, she wrote:

> Since the assistant principal of the Stamford High School, where the mural was

originally placed, believes that the mural should be replaced there, I am writing to Karel Yasko in Washington to suggest he follow up on this idea to see if something can be worked out.[18]

Ms. Paul wrote Mr. Yasko:

> You expressed interest in finding a public area in which to replace these murals. One of the loose ends I followed in my research was to telephone the Stamford High School office to see if the original architecture still stood; it does indeed. On May 19, I spoke to the assistant principal, a Mr. Walter O'Meara (202) 358-4275. He was extremely enthusiastic about the old murals having been found and placed into [sic] the hands of a conservator. I suggested replacing them in their original place and he agreed this seemed a good idea--I do not know if this is possible and this is all the further I have taken it. As I recall from our conversation, you would go ahead with having Mr. Hoelzer restore the mural when a suitable place could be located. Since you and your office carry this power, I wonder if you might consider this most tentative of ideas?[19]

Ms. Paul did not hear from either Mr. Hoelzer or Mr. Yasko.

Nonetheless, Ms. Paul maintained her interest in the mural. In September 1982 she wrote to the City's Board of Education stating that the mural was "now in the hand of a conservator in New York City awaiting funds for restoration" and asking "who ordered the murals removed, when and why this was done?"[20] After two months had passed without a response, Ms. Paul sent a second letter but it, too, went unanswered.

Sometime during 1981 Mr. Hoelzer called Mr. Yasko and reported on Ms. Paul's, Mr. Nerreau's and Mr. Daugherty's visits. Mr. Hoelzer complained that "he was being abandoned by the G.S.A. with the murals without their being relocated and without any compensation to him."[21] Michael Ragone, an art restorer in plaintiff's employ, overheard Mr. Hoelzer say to Mr. Yasko that "everything had been

dumped on him and that the murals were his."[22]

The City waited until 1986 before it next contacted Mr. Hoelzer. Marguerite Strop, the City's Public Arts Director, visited Mr. Hoelzer on August 6, 1986. Ms. Strop was investigating the City's collection of W.P.A. and other New Deal era art and received Mr. Hoelzer's name from the G.S.A. "She intended to make an application on behalf of the City for a National Endowments Grant for the restoration of the murals, but the plaintiff refused to cooperate."[23]

Sometime during the summer of 1986 Mr. Hoelzer called the G.S.A. with respect to "an ownership disclaimer to the Dougherty [sic] murals from the Stamford High School."[24] The G.S.A. sent Mr. Hoelzer a March 26, 1934 policy memorandum from an Assistant Secretary of the

Treasury entitled "Legal Title to Works Produced under the Public Works of Art Project" which provides that ""[a]ll works of art executed with the intent that they should occupy a particular place in some public building are to be treated as a part of that building." The G.S.A. stated that since the mural fell within that category, it is "not within the purview of ownership and/or maintenance by the Federal Government" - and suggested the matter be resolved directly with the City.[25]

Shortly thereafter, the City's Department of Law wrote to Mr. Hoelzer:

> It has come to my attention that you are in possession of murals painted in Stamford High School by James Dougherty [sic] . . . . The City of Stamford was pleased to learn the murals have been held in great care by a man of your expertise. As the owner of these works of art, we are anxious for their return. . . .
> . . . .
> Your care in storage and

> restoration will be appreciated now and for generations to come. As you are informed of the status of these panels, you, of course, will not consider presenting them for any alternate display or ownership.[26]

On October 14, 1986 Mr. Hoelzer responded:

> 1. The murals were knowingly trashed by Stamford more than fifteen years ago.
> 2. As such, Stamford has no legal claim to them.
> 3. They belong to me.[27]

The City again wrote to Mr. Hoelzer on November 13, 1986, stating:

> In a very legal sense, you took these murals knowing exactly what they were and that they did not obviously belong to the person you accepted them from. As you have indicated in your own correspondence to the federal government, you have realized from the beginning that these panels were not yours. . .
> . . . .
> If necessary, we are prepared to bring legal action to prove our title to the murals or to prevent any transfer of the same.[28]

On May 8, 1987 two attorneys for the

City examined the mural at Mr. Hoelzer's workshop. When the City's mayor and other representatives examined the mural on July 5, 1988, they claimed that it belonged to the City, a position Mr. Hoelzer rejected.[29]

On January 10, 1989 Mr. Hoelzer commenced this suit in New York Supreme Court, Westchester County, seeking a declaratory judgment to quiet title. The City removed the case to this court, and asserts that it owns the mural.

Sotheby's appraised the mural's value at $1,250,000[30] and the firm of Connecticut Fine Arts at $90,000 to $100,000.[31]

DISCUSSION

Mr. Hoelzer contends that the School abandoned the mural, and that any claim of

ownership it might have is barred by the statute of limitations. The City counters that Mr. Hoelzer has never had an ownership interest in the mural, and has merely held it for the purposes of restoration. It also argues that its claim is not time-barred because Mr. Hoelzer did not refuse its demand until October 1986.

1. Abandonment

Notwithstanding the School's less than careful treatment of the mural, it did not abandon the mural during the 1970 summer recess.

The doctrine of abandonment requires both an intent to abandon the property and acts constituting abandonment.

> Abandonment is always voluntary and involves a positive intention to part with ownership. It is essential that

> the owner act without coercion or pressure. . . . [and that] there is a total desertion by the owner without being pressed by any necessity, duty, or utility to himself, but simply because he no longer desires to possess the thing and willingly abandons it to whoever wishes to possess it.

Katsaris v. United States, 684 F.2d 758, 762 (11th Cir. 2982) (Citations omitted). See also Idaho v. Oregon Short Line R. Co., 617 F. Supp. 213, 217 (D. Idaho 1985) (abandonment requires "(1) present intent to abandon, and (2) physical acts evidencing clear intent to relinquish the property interest."); Mombro v. Louis Capano & Sons, Inc., 526 F. Supp. 1237, 1240 (D. Del. 1981) (abandonment requires "intent to relinquish a known right of interest").

The City did not perform, or knowingly acquiesce in, "physical acts evidencing clear intent to relinquish the property interest." Idaho v. Oregon Short

Line R. Co., 617 F. Supp. at 217.

The only statement of the City's intent is the April 3, 1967 letter from its Superintendent of Schools stating that the Board of Education wished the architects "to remove [the mural] from the wall and roll it for proper storage." That the City's wishes were not fulfilled by the workmen or more forcefully conveyed to those responsible for the mural's storage, does not establish that the City intended to part with the mural.

Nor should an intent to abandon be inferred from the City's apparent failure to investigate the missing mural. Only Mr. Bowne, Mr. Yasko and Mr. Hoelzer knew of the mural's whereabouts, and none chose to ask the City if, despite appearances to the contrary, it had any interest in the mural. See U.S. v. Taglione, 546 F.2d 194, 198 (5th Cir. 1977) ("It is the duty

of a finder of lost goods to return them to the owner if he is known and, if the owner is unknown, to follow the reasonable procedures for discovering the true owner."). For all City officials knew, the mural was properly in storage. See Mucha v. King, 792 F.2d 602, 610, (7th Cir. 1986) ("Abandonment is a voluntary relinquishment of rights, see e.g., Menzel v. List, 49 Misc. 2d 300, 305, 267 N.Y.S.2d 804, 809-10 (Sup.Ct.1966), aff'd as modified, 28 A.D.2d 516, 279 N.Y.S.2d 608 (1967) (per curiam), rev'd, 24 N.Y.2d 91, 298 N.Y.S.2d 979, 246 N.E.2d 742 (1969) (reinstating trial court's award of damages), and thus implies . . . knowledge of those rights.").

2. Statute of Limitations

The City is entitled to the mural's

return only if it asserted its claim within the relevant statute of limitations.

a. The applicable statute of limitations

In diversity cases, federal courts apply the law of the forum state, including its choice of law rules. Klaxon v. Stentor Electronic Mfg. Co., 313 U.S. 487 (1941). In New York, actions that accrue within the state are governed by the state's statute of limitations, while those that accrue outside of New York are governed by either the New York or foreign statute limitations period, whichever is shorter. N.Y. C.P.L.R. § 202 (McKinney 1972 & Supp. 1989); DeWeerth v. Baldinger, 836 F.2d 103, 106 (2d Cir. 1987) (citing Martin v. Julius Dierck Equip. Co., 403 N.Y.S.2d 185, 187 (Ct. App. 1978)), cert.

denied, 108 S. Ct. 2823 (1988).

Under New York law, personal property is governed by the law of the state where the property is located. 19 N.Y. Jur. § 24. See also Kunstsammlungen Zu Weimar v. Elicofon, 536 F. Supp. 829, 846-47 (E.D.N.Y. 1981) (validity of transfers of personal property are governed by law of state where property is located), aff'd, 678 F.2d 1150 (2d Cir. 1982). Because the mural is located in New York, any claim to it accrues in New York, and its statute of limitations applies.

Since the underlying coercive action in this declaratory judgment action is a tort claim for interference with property such as conversion or trespass to chattels, analysis of this choice of law issue under New York's "interest analysis" or "significant relationship" test seems appropriate.[32] See Elicofon, 536 F. Supp.

at 846. Interest analysis also applies when determining where a claim accrued for statute of limitations purposes. Martin, 403 N.Y.S.2d at 189. Under traditional tort principles, the law of the place of injury invariably controlled, and under interest analysis this is still the general rule. Elicofon, 536 F. Supp. at 846. See also Schultz v. Boy Scouts of America, 491 N.Y.S.2d 90, 95 (Ct. App. 1985) (place of wrong and parties' domicile are "almost exclusively" most significant contacts). Absent "special circumstances", the law of the place of injury applies. Bader v. Purdom, 841 F.2d 38, 40 (2d Cir. 1988) (citing Neumeier v. Kuehner, 335 N.Y.S.2d 64 (Ct. App. 1970)). Because there are no other special circumstances for replacing the place of injury rule and any injury to the City caused by Mr. Hoelzer would have occurred

in New York, where he took possession and stored the mural, New York law governs.

b. Application of the New York statute of limitations

The pertinent statute of limitations provides that all actions for recovery of or injury to chattels must be commenced within three years. N.Y. C.P.L.R. § 214(3) (McKinney 1972 & Supp. 1989).

In order for the owner of property to have a claim against one in rightful possession, the owner must first make a demand on the possessor. See Agawam Trading Corp. v. Mayer Malbin Co., 325 N.Y.S.2d 757 (1st Dep't 1971). This demand may not be unreasonably delayed. DeWeerth, 836 F.2d at 107. The parties disagree on how Mr. Hoelzer's possession of the mural should be characterized. Mr.

Hoelzer claims that he is similar to a good faith purchaser, while the City asserts that he is a bailee. Under either characterization, Mr. Hoelzer's possession is "rightful." See Elicofon, 678 F.2d at 1161 (good faith purchaser is in lawful possession until demand), Heneghan v. Cap-A-Radiator Shops, 506 N.Y.S.2d 132, 134 (D. Ct. 1986) (bailee repair shop is in lawful possession of automobile left with it until demand is made). Therefore, in order for the statute of limitations to have run on the City's claim against Mr. Hoelzer, the City's demand must have been unreasonably delayed.

In DeWeerth v. Baldinger, a Monet painting stolen during or immediately after the Second World War. DeWeerth, 836 F.2d at 105. The owner, DeWeerth, made several lackluster attempts to recover the Monet.[33] It was ultimately discovered in

the hands of a good faith purchaser in 1982. Id. at 105-06. The court held that there is a duty of reasonable diligence in attempting to locate stolen property, in addition to the undisputed duty to make a demand for return within a reasonable time after the current possessor is identified." Id. at 108.[34] It found that DeWeerth had failed to exercise reasonable diligence in looking for the Monet.

There are important differences between this case and DeWeerth. Perhaps the most significant is that Mr. Hoelzer is not a good faith purchaser. He did not give any value for the mural, expecting to buy it. Rather, he expected to return it to the appropriate owner at the appropriate time. Instead of being damaged by being forced to return the mural, as a good faith purchaser would be, Mr. Hoelzer would receive a windfall by

being allowed to keep it. The equitable rule in DeWeerth was not designed for this inequitable result.

Nor does the holding in DeWeerth mandate this outcome. DeWeerth requires an owner to act reasonably in seeking return of property. DeWeerth, 836 F.2d at 108. "The question of what constitutes unreasonable delay in making a demand that starts the statute of limitations depends upon the circumstances of the case." Id. at 110. Under the circumstances the City did not act so unreasonably as to deprive it of the mural.

Initially, City officials might have reasonably assumed that the mural was in storage at the school. However, they knew that Mr. Hoelzer had the mural as early as the late 1970's, when Mr. Daugherty, the artists' son, discussed the mural with Mr. Nerreau, the School's Director of Art and

Music. Mr. Nerreau visited Mr. Hoelzer and inspected the mural in 1980. In 1982, Ms. Paul twice wrote to the School indicating that she knew where the mural was. The School could have located and repossessed the mural, yet it did not.

However, the need to act did not appear urgent. The City knew that the mural had been given to an art restorer. Mr. Hoelzer did not make an explicit claim of ownership until the City requested return of the mural in 1986. In 1972, Mr. Hoelzer sent Mr. Yasko an estimate for restoring the mural. In 1980. he wrote to Mr. Daugherty requesting some pictures of the mural taken when it was in place at the School.[35] In that letter, Mr. Hoelzer stated that he hoped that the pictures would help "get the Government moving."[36] These are the statements of a custodian, not an owner, although Mr. Hoelzer

apparently believed the G.S.A., rather than the City, owned the mural. Indeed, there is no evidence of a claim of ownership by Mr. Hoelzer prior to the City's demand.[37]

The requirement that a demand not be unreasonably delayed focuses on the actions of the true owner. DeWeerth, 836 F.2d at 107 n.4. However, in assessing the reasonableness of the owner's actions, the possessor's conduct may be relevant. See id. at 112. Mr. Hoelzer did nothing until 1986 that might have alerted the City to an adverse claim. It was reasonable for City officials to believe that, as long as Mr. Hoelzer did not assert ownership over the mural, he continued to possess it as a custodian or bailee.

The City can be faulted for leaving a valuable piece of art in storage for so

long. However, this blame should not, and does not, give title to Mr. Hoelzer who paid nothing for the mural and has no claim to it other than his preservation and storage of it for its owner, until he determined that it should be his.

CONCLUSION

The City owns the mural. The first alleged cause of action, to quiet title, is dismissed on the merits.

A conference will be held on November 17, 1989 at 4:20 P.M. with respect to the remaining cause of action, for the reasonable value of Mr. Hoelzer's services.

So ordered.

Dated: October 16, 1989
New York, New York

/s/ Louis L. Stanton
U.S.D.J.

[FOOTNOTES]

1. Some documents refer to Mr. Daugherty's work as "the mural" and others as "the murals."

2. December 10, 1980 Memorandum from John C. Nerreau, Coordinator of Art and Music, Stamford Public Schools to Dr. Thomas F. Reardon, Acting Superintendent of Schools (the "Nerreau Memo").

3. March 24, 1967 Letter from Frank G. Lopez of Ballard Todd Associates to Dr. Joseph Porter, Superintendent of Schools.

4. April 3, 1967 Letter from Joseph B. Porter to Mr. Frank G. Lopez.

5. Stipulated facts, ¶ 4.d.ii.

6. Id., ¶ 6.

7. Id., ¶ 9.

8. August 25, 1971 Letter from Frank Bowne to Mr. Karel Yasko, Fine Arts Inventory Project, General Services

Administration.

9. Id.

10. September 27, 1971 Letter from Karel Yasko to Mr. Frank Bowne.

11. Mr. Bowne does not claim any interest in the mural. (Stipulated facts, ¶ 7.1)

12. September 18, 1987 Letter from Stewart G. Rosenblum to Dr. Arlene Quint, G.S.A.

13. April 25, 1972 Letter from Hiram H. Hoelzer to Mr. Karel Yasko.

14. Stipulated Facts, ¶10.a.

15. Id., ¶¶ 10.d, 12.a

16. Supplemental Stipulated Facts, ¶ 1.

17. Nerreau Memo.

18. July 1, 1980 Letter from April J. Paul to Hiram.

19. July 3, 1980 Letter from April J. Paul to Mr. Yasko.

20. September 17, 1982 Letter from April Lapland Paul to Stamford Board of Education.

21. Stipulated Facts, ¶ 13.

22. Id., ¶ 26.b.iii.

23. Id., ¶ 14.f.

24. August 19, 1986 Letter from William R. Lawson, G.S.A. Deputy Assistant Commissioner for Real Property Development, to Mr. Hiram Hoelzer.

25. Id.

26. September 25, 1986 Letter from Michael Gene Clear to Mr. Hiram Hoelzer.

27. October 14, 1986 Letter from Hiram H. Hoelzer to Mr. Michael Gene Clear.

28. November 13, 1986 Letter from Michael Gene Clear to Mr. Hiram Hoelzer.

29. Stipulated facts, ¶20, 22.

30. May 7, 1987 Letter from Deborah Coy Ahearn, Vice President and Director,

Sotheby's, to Mr. Hiram Hoelzer.

31. June 3, 1987 Appraisal of Burt Chernow, Connecticut Fine Arts, at the request of Margurite [sic] Strop.

32. It is important to note that the interest of the states in applying their statute of limitations is not the relevant inquiry here. Rather, § 202 and New York's choice of law rules for the statute of limitations are concerned with where the underlying claim accrued. If the claim accrued in New York, it will provide the statute of limitations. Therefore, the inquiry is which state has the greatest interest in any property-related tort the City might have had as a result of Mr. Hoelzer's actions.

33. DeWeerth made inquiries with the military authorities in 1946, made an insurance claim in 1948, sent a letter to an art professor in 1955, and sent a list

of her missing artwork to the West German authorities in 1957. DeWeerth, 836 F.2d at 105. She made no further attempts to locate the Monet. Id.

34. Under New York law, the owner must make a demand on a good faith purchaser of stolen property before there is any cause of action against the purchaser. Elicofon, 678 F.2d at 1161. In cases where a demand is necessary, the statute of limitations begins to run "when the right to make the demand is complete." N.Y. C.P.L.R. § 206(a) (McKinney 1972 & Supp. 1989). However, this provision only applies to demands that are procedural, which means the cause of action existed and the defendant's conduct giving rise to the claim was completed before the demand was made. Elicofon, 678 F.2d at 1161. It does not apply where, as in the case of a good faith purchaser or a bailee, a demand

is substantive, or in other words where a demand is an element of the plaintiff's prima facie case. Id. Instead, in cases where the demand is substantive, the analysis set forth in DeWeerth applies.

35. August 22, 1980 Letter from Hiram H. Hoelzer to Charles M. Daugherty.

36. Id.

37. In 1981 Mr. Hoelzer complained to Mr. Yasko that he was being abandoned with the murals and that "they were his." Stipulated Facts, ¶ 26.b.iii. However, this statement was never communicated to the City.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
89 Civ. 0641 (LLS)

----------x

HIRAM H. HOELZER,

Plaintiff,

- against -

THE CITY OF STAMFORD, CONNECTICUT

Defendant.

----------x

MEMO ENDORSEMENT

Plaintiff Hiram Hoelzer moves for certification for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (1982 & Supp. 1987) of this court's decision that the City owns the mural. 722 F. Supp. 1106 (S.D.N.Y. 1987).

Section 1292(b) states that a district judge may certify an interlocutory order for immediate appeal if the court "shall be of the opinion that such an order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from

the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

Certification is to be used "'sparingly and only in exceptional cases.'" Department of Economic Development v. Arthur Andersen & Co., 683 F. Supp. 1463, 1486 (S.D.N.Y. 1988) (quoting Samuel M. Feinberg Testamentary Trust v. Carter, 652 F. Supp. 1066, 1084 (S.D.N.Y. 1987)). Nevertheless, this case is an appropriate one for such certification.

The chief question in this litigation is "who owns the mural?" If the district court correctly decided that the City owns it, there must be a further trial requiring expert testimony at substantial expense to the parties to determine the reasonable value of plaintiff's services in repairing and restoring the mural. If

it is ultimately held that the plaintiff, rather than the City, owns the mural, the case will be over at that point. Thus an immediate appeal may materially advance the ultimate termination of the litigation. Indeed, if the district court's decision is affirmed, any further appeal may be unlikely since it would address only the calculation of compensation; it should in any event not be duplicative of the question raised on an immediate appeal.

The district court decision determines central questions which are not directly settled by controlling authority. Unlike most cases in this area of the law, here the plaintiff is not a bona fide purchaser for value. He urges that his long possession and restoration of the mural in good faith, coupled with the City's negligent disregard and lack of

interest for well over a decade in the possession of the mural, entitled him to its ownership.

Under the circumstances, I am of the opinion that the October 16, 1989 order entered in this case, determining that the City owns the mural and dismissing the first alleged cause of action on the merits, involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate from the order may materially advance the ultimate termination of the litigation.

Accordingly, the motion for certification is granted.

DATED: New York, New York
January 3, 1990

/s/ Louis J. Stanton
U. S. D. J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of July, one thousand nine hundred and ninety-one.

DOCKET NUMBER: 92-7186

HIRAM H. HOELZER,

Plaintiff-Appellant,

V.

THE CITY OF STAMFORD, CONNECTICUT

Defendant-Appellee.

UNITED STATES COURT OF
APPEALS, SECOND CIRCUIT
Filed Jul 12, 1991
Elaine B. Goldsmith, Clerk

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Plaintiff-Appellant, Hiram H. Hoelzer.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
Elaine B. Goldsmith
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 30th day of September one thousand nine hundred and ninety-two.

DOCKET NUMBER: 92-7186

HIRAM H. HOELZER,

Plaintiff-Appellee,

V.

THE CITY OF STAMFORD, CONNECTICUT

Defendant-Appellant.

UNITED STATES COURT OF
APPEALS, SECOND CIRCUIT
Filed Sep. 30, 1992
Elaine B. Goldsmith, Clerk

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellee, Hiram H. Hoelzer.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for

rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

SO ORDERED:

FOR THE COURT,
Elaine B. Goldsmith, Clerk
By: /s/ Kathy Brouwer
Kathy Brouwer, Operations Mgr.
9-29-92
(Date)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SDNY
89-CV-641
STANTON

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 13th day of Agust, one thousand nine hundred and ninety-two.

Present: HON. J. EDWARD LUMBARD,
HON. ELLSWORTH VAN GRAAFEILAND,
HON. AMALYA L. KEARSE,
Circuit Judges.

DOCKET NUMBER: 92-7186

HIRAM H. HOELZER,

Plaintiff-Appellee,

V.

THE CITY OF STAMFORD, CONNECTICUT

Defendant-Appellant.

UNITED STATES COURT OF
APPEALS, SECOND CIRCUIT
Filed Aug. 13, 1992
Elaine B. Goldsmith, Clerk

Appeal from the United States District Court for the Southern District

of New York.

This cause came on to be heard on the transcript of record from the United States district Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is hereby ORDERED, AJDUDGED, and DECREED that the judgment of said district court be and it hereby is affirmed as modified and without costs in accordance wit the opinion of this court.

ELAINE B. GOLDSMITH, CLERK
By:
/s/ Arthur Heller

Arthur Heller,
Deputy Clerk

Issued As Mandate
10-7-92

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
89 Civ. 0641 (LLS)

----------x

HIRAM H. HOELZER,

Plaintiff,

- against -

THE CITY OF STAMFORD, CONNECTICUT

Defendant.

----------x

STIPULATION RE: APPEAL BOND
AND STAY OF EXECUTION

WHEREAS, the defendant pursuant to FRCP 62 must file a bond for approximately $650,000 (representing interest and principal during pendency of appeal on the judgment of $557,200) to obtain a stay of execution during pendency of the appeal of the court's ruling announced on January 9, 1992, and

WHEREAS, the defendant would rather pay to the Plaintiff the non-refundable appeal bond premium to reduce the obligation for storage and partial restoration that defendant acknowledges it owes to the Plaintiff even if the

defendant is successful on appeal and there is a remand for new trial;

IT IS HEREBY STIPULATED AND AGREED, as follows:

1. The Plaintiff will waive an appeal bond and agree not to execute upon the judgment until after the appeal to the Second Circuit Court of Appeals has been exhausted as if the court granted a stay of execution pursuant to FRCP 62.

2. Stamford hereby represents that it will maintain in its self-insurance account at least $650,000 unencumbered and available to satisfy any judgement in the event that the Second Circuit rejects the defendant's appeal or said appeal is not prosecuted to effect.

3. Neither party will seek to introduce this agreement into evidence in order to prove the liability or lack thereof of the parties in the event of a

retrial or further proceedings in the event of a remand, or in argument to the Second Circuit, although the sum of $20,000 will reduce the obligation owed by the defendant to the plaintiff for storage and partial restoration which the defendant argues is not in excess of $60,000.

4. The parties agree that this sum may be expended by the Plaintiff on account of any future payments made to settle this case or to pay any future judgment, and is not refundable in any way; this payment is made on account of such obligation.

5. The parties agree to prosecute the appeal expeditiously in an effort to have the case heard by the Second Circuit as soon as possible.

PLAINTIFF
HIRAM HOELZER

/s/Stephen A. Wise
Stephen A. Wise
Wise and Layton
P. O. Box 995
New Canaan, CT 06840
(203)-966-8600

DEFENDANT
CITY OF STAMFORD

by /s/James V. Minor
James V. Minor
Assistant Corporation Counsel
868 Washington Boulevard
Stamford, CT 06904
(203)-977-4087

CERTIFICATE OF SERVICE

I hereby certify that on October 22, 1992, three copies of the foregoing appendix, were mailed, postage prepaid, to James V. Minor, Esq., City of Stamford Law Department, P.O. Box 10152, Stamford, CT 06904-2152.

Stephen A Wise
Stephen A. Wise, Attorney

Supreme Court, U.S.
FILED
NOV 20 1992
CLERK

No. 92-736

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

HIRAM H. HOELZER,
Petitioner

v.

THE CITY OF STAMFORD, CONNECTICUT
Respondent

Petition for Writ of Certiorari to the United States Supreme Court of Appeals from the Second Circuit

---

BRIEF OF THE RESPONDENT IN OPPOSITION

DANIEL M. MCCABE
CORPORATION COUNSEL
OF CITY OF STAMFORD, CT

JAMES V. MINOR
ASSISTANT CORPORATION COUNSEL
COUNSEL OF RECORD
888 WASHINGTON BLVD.
P.O. BOX 10152
STAMFORD, CT. 06904-2152
(203) 977-4077

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES..... iii

STATEMENT OF THE CASE..... 1

ARGUMENT..... 8

1. Did the Second Circuit "so far depart from the accepted and usual course of judicial proceedings...as to call for an exercise of this Court's power of supervision"? 8

2. Did the Second Circuit err in allowing the City of Stamford to satisfy a judgment of $557,200 by returning murals to petitioner Hoelzer in lieu of paying damages? 10

CONCLUSION 14

TABLE OF AUTHORITIES

A. CASES

Alden Auto Parts v. Dolphin Equipment Leasing, 682 F.2d 330, 333 (2nd Cir 1982) 13

Chicago Title Ins Co v. Farmers Ins Co, 734 S.W. 2d 887, 890 (Mo. 1987) . . . 10

First Federal Savings & Loan Assoc. of Missouri v. Wills & Farris, 789 S.W.2d. 873, 875 (Mo.App. 1990) 10

Hoelzer v. City of Stamford, 972 F.2d 495, 498 (2nd Cir 1992) 6, 9, 13

Hoelzer v. Stamford, 722 F. Supp. 1106 (SDNY 1989) 2, 5

STATEMENT OF THE CASE

Hiram Hoelzer ("Hoelzer"), an art restorer, sued in state court in 1989 to quiet title to WPA murals, removed from the walls of the Stamford High School, which he restored from 1972 to 1987. After failing to gain title for years, he has finally won, and now is seeking the extraordinary relief of certiorari for a state law question, complaining that granting of the equitable relief that he long sought is so unfair as to require Supreme Court supervision of the Second Circuit!

Hoelzer always "categorically rejected all ownership claims by the City", as he alleged in his complaint. His Complaint sought title in the first count since the "title was clouded" by Stamford's "erroneous claim" that it owned the murals in August, 1986 by Marguerite Strop, the City's art director (¶14), which provoked Plaintiff to get a

ownership disclaimer from GSA (¶15). In September and October, 1986 after an exchange of letters between Mr. Hoelzer and the Corporation Counsel as to ownership (¶¶16-18), Hoelzer brought this action to quiet title.

After the state court action was removed to the federal court for the Southern District of New York, the trial court (Stanton, J) ruled that the City of Stamford had title to the murals; Hoelzer v. Stamford, 722 F. Supp. 1106 (SDNY 1989). See Appendix attached to Hoelzer's Petition (hereinafter "App.") pp. A38-A72.

The trial court decision emphasized that from 1986 to the present, Hoelzer did not seek compensation for his work on the murals, but ownership of the murals based upon a theory of abandonment or statute of limitations.

> Marguerite Strop, the City's public art director, visited Mr. Hoelzer on August 6, 1986. Ms. Strop was investigating the

> City's collection of WPA and other new deal era art ... She intended to make an application on behalf of the City for a National Endowment grant for the restoration of the murals, but the Plaintiff refused to cooperate. (Id. at 1109; A49; emphasis added).
>
> Sometime during the summer of 1986 Mr. Hoelzer called the GSA with respect to an ownership disclaimer ... the GSA ... suggested the matter be resolved directly with the City. (A49-50).

Shortly thereafter, the City's Department of Law wrote to Mr. Hoelzer:

> It has come to my attention that you are in possession of murals painted in Stamford High School by James Daugherty ...As the owner of these works of art, we are anxious for their return...
>
> ...
>
> As you are informed of the status of these panels, you, or course, will not consider presenting them for any alternate display or ownership. (emphasis added).

On October 14, 1986 Mr. Hoelzer responded:

> 1. The murals were knowingly trashed by Stamford more than fifteen years ago.

2. As such, Stamford has no legal claim to them.

3. They belong to me.

The City again wrote to Mr. Hoelzer on November 13, 1986, stating:

> ... [Y]ou took these murals knowing exactly what they were and that they did not obviously belong to the person you accepted them from. As you have indicated in your own correspondence to the federal government you have realized from the beginning that these panels were not yours... If necessary, we are prepared to bring legal action to prove our title to the murals or to prevent any transfer of the same. (emphasis added, Id, at p.1110; A50-51)

Hoelzer was so upset by the trial court's decision, that he sought and received the extraordinary relief of an interlocutory appeal, but again lost his battle for ownership before the Second Circuit, Hoelzer v. Stamford, 933 F.2d 1131 (2d Cir. 1991) (App A8 - A27).

On remand, the trial court entered judgment for Hoelzer for $557,200 against

the City based upon his affidavit of time spent working on the murals. The City appealed, and the judgment was affirmed in part and modified in part, with Hoelzer winning the goal of ownership after losing two prior decisions, since the City elected to abandon title to the murals to him. The Second Circuit ruled that the City was correct in its argument that it was being forced to pay for services that it did not request, and had no knowledge would be so expensive, at the time Hoelzer did the unauthorized restoration work in 1986-7 (Hoelzer's petition, p.7, fn 2).

The only previous written estimate given by Hoelzer was in 1972 for restoration ("Remove glue, flatten canvases, clean paintings, retouch, prevent further flaking, and roll them and identify, ready for storage and rehanging" of 900 square feet of canvas) at $6,400. (722 F. Supp. at 1108; A44).

In 1980, Hoelzer gave an estimate to a City representative to restore the murals for a total of $63,000. (Id. at 1109; A46).

The stubborn refusal of Hoelzer to cooperate with the City by either returning the murals as demanded by the City in 1986 without the 80% of the work he did in 1986 and 1987 (Hoelzer's petition, p.7, fn 2), or in refusing to update his previous estimates of $6,400 or $63,000, resulted in the City being surprised by a judgment of the trial court 100 times his 1972 estimate and 10 times his 1980 estimate.

Therefore, the Second Circuit correctly ruled that the City could satisfy the judgment of $557,200 in full by giving title to the murals to Hoelzer, Hoelzer v. City of Stamford, 972 F.2d 495, 498 (2nd Cir 1992) (App A1- A7).

The City of Stamford never questioned the fact that Mr. Hoelzer was

entitled to payment for the stabilization of the murals that came into his possession in 1971. The City offered in 1986 to pay what Mr. Hoelzer estimated in 1972 to be the cost of such emergency restoration and stabilization, or $6,400 (A5). At trial, the City put the upper limit of fair compensation at $60,000, based upon the figures given by the experts on both sides; this is still the City's position, as indicated in the stipulation signed in October 1991, p. A-85.

However, the City always disputed the equity of Hoelzer's foisting services that the City did not request, since Hoelzer did 80% of the total restoration work <u>after the City demanded that he return the murals</u>, and since his bill far exceeded the value of his services, since the trial court found that there "... may, as a practical matter, be little if

any market value" for the murals (p. A30).

ARGUMENT

1. The Second Circuit did not "so far depart from the accepted and usual course of judicial proceedings...as to call for an exercise of this Court's power of supervision".

Rule 10.1 of the Supreme Court states that a petition for a writ of certiorari "... will be granted only when there are special and important reasons therefor" when the Circuit Court has "... so far departed from the accepted and usual course of judicial proceedings... as to call for an exercise of this Court's power of supervision".

This dispute does not involve a question of federal law, but interpretation of the law of equity of the state of New York. ("On the equities, we cannot say that Stamford should be compelled to pay any such amount unless

it is willing to do so." 972 F.2d at 498; A7).

Hoelzer cannot complain that the Second Circuit erred in awarding the City the option to give him title to the murals, since that is the relief he sought from 1986 until 1991. Hoelzer, who claimed that the mural is worth $1.2 million dollars according to an appraisal he obtained from Sotheby's (A4, A16, A52), cannot complain that it is unfair that he can't force the City to pay for his services rather than elect to satisfy its obligation by giving him the murals, especially since the Second Circuit found Hoelzer to be at fault in never demanding payment for his services until years after he performed work without the consent of the city.

Hoelzer's complaint brings to mind the dedication to Truman Capote's last, unfinished novel, Answered Prayers: "More

tears are shed over answered prayers than unanswered ones"- St. Teresa of Avila.

2. The Second Circuit correctly allowed the City of Stamford to satisfy a judgment of $557,200 by returning murals to petitioner Hoelzer in lieu of paying damages.

The City argued vigorously that Hoelzer was an officious volunteer, who improved the murals despite knowledge of an adverse title claim, and who is therefore not entitled to restitution. Chicago Title Ins Co v. Farmers Ins Co, 734 S.W. 2d 887 (Mo. 1987). Hoelzer could have litigated title after the City demanded the return of the murals in September, 1986; instead he had his apprentice restore the murals for almost a year after October 1986 doing 80% of the work for which he later claimed hourly reimbursement. First Federal Savings & Loan Assoc. of Missouri v. Wills & Farris, 789 S.W.2d. 873, 875 (Mo.App. 1990).

There is a public policy argument against encouraging an art conservator to take control of fine art, "improve" it in hopes of selling it, and after losing an adverse title claim, profit from the unwanted work done on speculation.

The Second Circuit acted equitably when it gave the City the choice to pay Hoelzer $557,200 for such hostage taking, 100 times his 1972 estimate, and 10 times his 1980 estimate, or to do what Hoelzer always wanted, which was to get title to the murals as payment.

This is a situation where Hoelzer, in the face of two letters from the Corporation Counsel asserting title and demanding return of the murals, engaged in a race with the City to complete the murals, in the hopes of selling it to some third party at the value he obtained from Sotheby's of $1.25 million.

Awarding Hoelzer the exact amount which he requested in his affidavit,

despite his earlier estimates of $6300 and the 1980 estimate of $63,000, would be unconscionable and unfair. The City's expert testified that a reasonable restoration fee would be less than $75 a square foot, and Hoelzer's own expert quoted $200 a square foot; the trial court awarded Hoelzer $636 per square foot, for work done contrary to the hostile title claim of the City. The Second Circuit corrected this injustice in giving the City the option of payment or turning over title, which is what Hoelzer sought.

Hoelzer misquotes the Second Circuit decision at pp. 7 and 19 of his Petition, implying that the Second Circuit erred by finding that the City did not know the amount of Hoelzer's hourly claim until 1992. In fact, the decision simply states that:

> Nevertheless, from a review of the evidence, it is clear that the City of Stamford could have had no idea that the cost of restoring the

> murals would come to as much as $557,200. When it claimed ownership and conceded that Hoelzer should receive some compensation for his labors [in 1986], the City could not have expected that Hoelzer would claim nearly as much as $557,200. Equitable compensation should not unduly prejudice the party which would otherwise receive the benefit...On the equities, we cannot say that Stamford should be compelled to pay any such amount unless it is willing to do so. (972 F.2d 495 at 498; A6-A7; emphasis added).

The only mention in the decision of "1992" is in a different paragraph:

> These estimates (the 1972 and 1980 estimates) are a small fraction of the $557,200 which Hoelzer eventually claimed at the 1992 trial before Judge Stanton. (Id. at 498; A6).

The decision cited by the Second Circuit stands for the equitable proposition that two negligent parties should not recover against each other when both suffer a loss, Alden Auto Parts v. Dolphin Equipment Leasing, 682 F.2d 330, 333 (2nd Cir 1982). In this case, Hoelzer's refusal to cooperate with the

City so that he gave no figure for his services, until years after they were completed in 1987, made it inequitable for him to complain that he must be paid in money as opposed to the product of his services.

CONCLUSION

The City believes that the Trial Court erred when it rejected the City's arguments -- based on essentially undisputed facts --that Hoelzer acted in "bad faith" by restoring the murals after the City, in 1986, asserted that it owned the murals, wanted them returned, and would take legal action if necessary; that it is contrary to public policy for an art "conservator" to modify a work of public art in the face of a contrary claim of title, without the consent of the owner; and that it is unfair and inequitable for the City to be forced to pay for "restoration" services that far exceeded the value of the finished

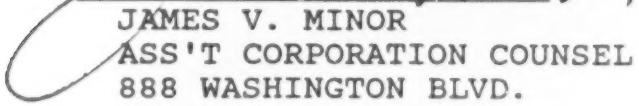
product -- a finished product which the Trial Court found has no market value. Although the Second Circuit did not reverse the Trial Court, it did achieve what it believed to be an equitable result, declining to force the City to pay $557,200 for work that in 1986 or 1987 it could never have imagined would prove to be so expensive.

The Second Circuit's decision, seeking to avoid penalizing the City, and reaching an equitable result, is not a departure from established principles of equity, much less a departure warranting supervisory intervention of this Court. To the contrary, to suggest that a case in which a party received precisely the relief it had requested from the start, is one requiring this Court's exercise of its supervisory power, borders on the frivolous.

For the above reasons, the Petition for Certiorari should be denied.

THE RESPONDENT
CITY OF STAMFORD

DANIEL M. MCCABE
CORPORATION COUNSEL

BY 

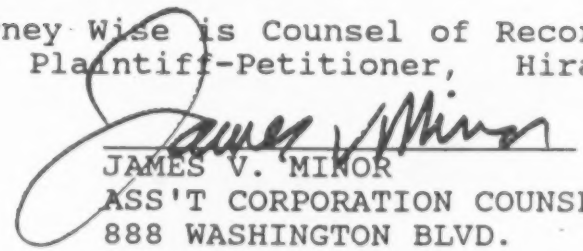
JAMES V. MINOR
ASS'T CORPORATION COUNSEL
888 WASHINGTON BLVD.
P.O. BOX 10152
STAMFORD, CT. 06904-2152
Tel: 203-977-4077
Fax: 203-977-5560

CERTIFICATION

This is to certify that all parties required to be served have been served as follows: five (5) copies of the foregoing Brief of the Respondent in Opposition to the Petition for Writ of Certiorari have been mailed on November 19, 1992, postage prepaid, and one copy faxed to:

Stephen A. Wise, Esq.
Wise and Layton
P.O. Box 995
New Canaan, CT 06840
Tel: (203)-966-8600
Fax: (203)-966-2169

Attorney Wise is Counsel of Record for the Plaintiff-Petitioner, Hiram Hoelzer.



JAMES V. MINOR
ASS'T CORPORATION COUNSEL
888 WASHINGTON BLVD.
P.O. BOX 10152
STAMFORD, CT. 06904-2152
Tel: 203-977-4077
Fax: 203-977-5560

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No. 92-736

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

HIRAM H. HOELZER,

Petitioner,

v.

THE CITY OF STAMFORD, CONNECTICUT.

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

PETITIONER'S REPLY BRIEF

Stephen A. Wise,
Counsel of Record
Wise and Layton
125 Main Street
New Canaan, CT 06840
(203)-966-8600

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POINT I

THE CITY'S TACIT ADMISSIONS AND LACK OF REPLY TO POINTS OF LAW SUPPORT SUMMARY REVERSAL.

The petition contained a **highlighted challenge** to the City to "point out any perceived misstatements" in the petition (p. 7, fn. 2, quoting Rule 15.1). The City did not do so and, most particularly, did not deny receiving the $557,200 charted claim in **1989** (id.), discussing it with Judge Stanton **that year** (id.), and the petitioner's focus on that in his brief on the second appeal (id., p. 10).

Also unchallenged were the showings that the City knew of this amount when it filed its **1990** brief conceding that the petitioner was "entitled to compensation" (id., p. 9) and that Judge Kaufman relied on this concession both orally and in his opinion (id.).

Q.E.D. That concession disproved

flatly the Circuit Court's statements that the City learned of this only "at the 1992 trial" and the ensuing sole premise that "When it...conceded that Hoelzer should receive some compensation for his labors, the City could not reasonably have expected that Hoelzer would claim nearly as much as $557,200" (A 6).

The City also dealt with none of the legal points raised in the petition.[1]

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1. a. Unanswered is the petition's showing that there is no precedent for the Circuit Court's arrogation of power to modify a decision which it found to have been based on "substantial evidence" and "no error" of law (Petition, p. 15)

b. Unanswered is the petition's charge that this absolute power "threatens all of the legal safeguards in our jurisprudence" (id., p. 30).

c. Unanswered is the petition's showing that the law of the case set on the first appeal was disregarded without any intervening change of circumstances (id., p. 21).

d. Unanswered was the petition's showing that the City's own appraiser testified that, during the years while the City stymied Mr. Hoelzer by this litigation, the value of the mural in the art market dropped sharply (id., p. 32).

All that the City's brief does is to repeat arguments about the merits of the case, to argue that "the Trial Court erred when it rejected the City's arguments... that Hoelzer acted in 'bad faith'" (Brief, p. 14), and to ignore the Circuit Court's contrary finding that there was no error below.[2]

In short, the errors of fact and law attributed to the Circuit Court in the petition stand undenied even though the City was challenged to contravene them. As stated in Supreme Court Practice (Stern, Gressman & Shapiro, 6th ed., 1986):

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2. It is not appropriate here to review all of those repeated arguments, for the City has not filed a cross-petition for ceriorari complaining of the Circuit Court's finding of "no error".

But one pungently misleading statement in the City's brief requires reply, namely, the assertion that "Hoelzer did 80% of the total restoration work after the City demanded that he return the murals" (Brief, p. 7). The record shows exactly the opposite in his testimony, as follows (TR 299): "Q. What percentage of the total job had been completed counting what you did in 1971, '74, '78, and '86 by November of 1986? A. 80%"

> "Summary Disposition Without Opinion...This kind of reversal order usually reflects the feeling of the majority of the Court that the lower court is so clearly erroneous...that full briefing and arguments would be a waste of time." (p. 277).

It is respectfully submitted that the unrefuted critical facts and points of law in the petition call for such summary disposition or, if not, for the granting of certiorari.

THE PETITIONER

By Stephen A. Wise

Stephen A. Wise, for
Wise and Layton
P.O. Box 995
New Canaan, CT 06840
Tel: (203)-966-8600
FAX: (203)-966-2169

CERTIFICATE OF SERVICE

I hereby certify that on November 20, 1992, 3 copies of the foregoing, were mailed, postage prepaid, to James V. Minor, Esq., City of Stamford Law Department, P.O. Box 10152, Stamford, CT 06904-2152.

Stephen A. Wise

Stephen A. Wise, Attorney